Supreme Court, U.S.
FILED

No. 04-1447 APR 26 2005

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2004

TAMELA Q. SIMMONS

Petitioner,

v.

NEVADA LANDING PARTNERSHIP,
ELGIN RIVERBOAT RESORT, d/b/a/
GRAND VICTORIA RIVERBOAT and
RGB LIMITED PARTERNERSHIP,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KENNETH N. FLAXMAN
200 South Michigan Avenue
Suite 1240
Chicago, Illinois 60604

(312) 427-3200
Attorney for Petitioner

QUESTION PRESENTED

In *United Airlines, Inc. v. McDonald,* 432 U.S. 385 (1977) the Court established a bright line rule, that intervention to appeal the denial of class certification is timely if sought "within the time period in which the named plaintiffs could have taken an appeal." Id. at 396.

The Seventh Circuit has modified this bright line rule to require the petitioning intervenor to secure intervention and file her notice of appeal within the time in which the named plaintiffs could have filed their notice of appeal, or, alternatively, to file a notice of appeal before being granted leave to intervene.

The following question is presented:

Under *United Airlines, Inc. v. McDonald,* 432 U.S. 385 (1977), does the filing of the motion to intervene to appeal, rather than the later approval of the motion and actual filing of the notice of appeal, determine the effective date of the filing of the notice of appeal?

INDEX

OPINIONS BELOW 1

JURISDICTION 1

RULES INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE WRIT 4

CONCLUSION 7

TABLE OF AUTHORITIES

Devlin v. Scardelletti, 536 U.S. 1 (2002) 6

Marino v. Ortiz, 484 U.S. 301 (1988) 4-5

Roe v. Town of Highland, 909 F.2d 1097 (7th Cir. 1990) 4, 5

United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977) . 4-6

United States for Use and Benefit of Canion v. Randall & Blake, 817 F.2d 1 (5th Cir. 1987) 6

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 26, 2005.

OPINIONS BELOW

The order of the Court of Appeals (App. 1-2) is unreported. The opinions of the district judge certifying the class (App. 3-13, 14-15) are unreported. The opinion of the magistrate judge decertifying the class (App. 16-53) is reported at 217 F.R.D. 415 (N.D.Ill. 2003). The opinion of the magistrate judge granting summary judgment against two of the original named plaintiffs (App. 54-68) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The order of the court of appeals was entered on January 26, 2005. (App. 1.)

RULES INVOLVED

This case involves Rule 24(c) of the Federal Rules of Civil Procedure and Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure.

Rule 24(c) provides in pertinent part as follows:

> A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

Rule 4(a)(1)(A) provides as follows:

> In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with

the district clerk within 30 days after the judgment or order appealed from is entered.

STATEMENT

The original plaintiffs Lisa Ellis, Yvonne Mason, and Marcia English brought this action under Title VII of the Civil Rights Act of 1964 complaining of discrimination in the hiring casino dealers on the basis of race by respondents, who operate a casino (the "Grand Victoria Casino") in Elgin, Illinois. Derrick Denson was subsequently added as a fourth plaintiff.

On March 27, 2000, the district court ordered that the case could proceed as a class action on behalf of "All African-Americans who were qualified for employment as 'dealers' and who applied for positions as 'dealers' at the Grand Victoria casino, but who were not hired from December 25, 1997 to the present." (App. 13.) The district court subsequently extended the ending date of the class to "a date two weeks prior to the scheduled pretrial conference in this action." (Record Item No. 46.)

On November 5, 2001, following a settlement conference before a magistrate judge, an order was entered that stated "Case settled." The parties then consented to jurisdiction by the magistrate judge. (Record Item Nos. 56, 57.) Thereafter, the magistrate judge refused to enforce the settlement (Order, March 25, 2002, Record Item No. 64), and subsequently entered an order reciting that "[c]ase not settled." (Order, May 29, 2002, Record Item No. 71.)

In an order dated August 21, 2003, the magistrate judge decertified the class. (App. 16-53.) Thereafter, the Seventh Circuit refused to grant interlocutory review of

the class decertification order. (Seventh Circuit, Order, No. 03-8013, September 22, 2003.)

The parties subsequently resolved the claims of named plaintiffs Derrick Denson and Yvonne Mason. (Order, January 13, 2004, Record Item No. 107.) The attorneys who had filed the case were granted leave to withdraw from representation of Ellis and English. (Order, January 13, 2004, Record Item No. 107.) After these plaintiffs obtained new counsel, (Record Item No. 119), the magistrate judge granted defendants' motion for summary judgment in an order dated September 21, 2004. (App. 54-68.) The judgment order, which resolved all of the claims remaining in the litigation, was entered on September 22, 2004. (Record Item No. 125.)

On October 20, 2004, when it became clear that neither Ellis nor English nor their new counsel had any interest in seeking review of the order denying class certification, sixteen members of the decertified class, represented by one of the attorneys who had formerly represented plaintiffs, filed their petition to intervene to appeal.[1] The petitioning-intervenors included a notice of appeal in their petition to intervene as the "pleading setting forth the claim or defense for which intervention is sought" required by Rule 24(c). The petition to intervene to appeal was filed within the 30 day period in the named plaintiffs could have taken an appeal.

---

1. Petitioner was one of the 16 petitioning-intervenors. The other 15 petitioners have filed individual actions and are not parties to this petition.

The magistrate judge granted the petition to intervene on October 26, 2004. (Record Item No. 128.) The notice of appeal was filed that day. (Record Item No. 129.)

In an unpublished order, the Seventh Circuit dismissed the appeal, holding that it did not have jurisdiction to hear the appeal. (App. 1-2.) The Court Appeals reached this result by applying its prior decision in *Roe v. Town of Highland,* 909 F.2d 1097 (7th Cir. 1990) that a member of a putative class who is permitted to intervene after judgment to appeal from an adverse class ruling must file his (or her) notice of appeal from the final decision within the time in which the original plaintiff could have filed a notice of appeal. (Appendix 2.)

REASONS FOR GRANTING THE WRIT

The rule applied by the Seventh Circuit in this case contradicts the bright line rule that this Court adopted in *United Airlines, Inc. v. McDonald,* 432 U.S. 385 (1977).

In *United Airlines, Inc. v. McDonald, supra,* the district court had refused to allow a Title VII case to proceed as a class action; the named plaintiffs resolved their individual claims and declined to appeal from the final decision to obtain review of the adverse class determination. When it became clear that the original plaintiffs had abandoned the claims for the putative class and would not seek review of the adverse class ruling, a member of the putative class sought to intervene to appeal. As in this case, the petitioning-intervenor in *McDonald* attached a notice of appeal to her intervention petition as the "pleading setting forth the claim or defense for which intervention is sought" required by Rule 24(c).

In holding that post-judgment intervention was timely, the Court set out the bright line rule that a person excluded from participation in a class action may intervene after judgment to appeal the adverse class ruling as long as intervention is sought "within the time period in which the named plaintiffs could have taken an appeal." *United Airlines, Inc. v. McDonald,* 432 U.S. 385, 396 (1977).

Petitioner in this case scrupulously followed this Court's instructions, and filed her petition to intervene on October 20, 2004, less than 30 days after entry of the final judgment on September 22, 2004.

The Seventh Circuit, however, refused to follow *United Airlines, Inc. v. McDonald,* and dismissed the appeal.

Although the Court of Appeal did not explain its refusal to follow *McDonald,* its ruling in this case follows its earlier opinion in *Roe v. Town of Highland,* 909 F.2d 1097 (7th Cir. 1990). There, the Seventh Circuit limited this Court's bright line rule by requiring the prospective intervenor to file her notice of appeal within the time in which a notice of appeal could have been filed by the original plaintiff. Id. at 1099. In the view of the Seventh Circuit, the petitioning intervenor must ask the district court to extend the time to appeal or — even before intervention is granted — "file a timely notice of appeal." Id.

The Seventh Circuit's limitation on the *McDonald* bright light rule is without merit. First, the proposition that a petitioning-intervenor may "file a timely notice of appeal" before intervention is granted was rejected in *Marino v. Ortiz,* 484 U.S. 301 (1988), where the Court

described as "well settled" the "rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." Id. at 304. Second, because the magistrate judge vacated the district judge's order that had allowed the case to proceed as a class action, the unnamed members of the class were not bound by the judgment, *Devlin v. Scardelletti,* 536 U.S. 1, 9-10 (2002), and — until intervention was granted — could not file a notice of appeal.

The Fifth Circuit has recognized that it is "the filing of the motion for intervention, and not the later approval of the motion and actual filing of the complaint, determines the commencement of the action for purposes of the statute of limitations." *United States for Use and Benefit of Canion v. Randall & Blake,* 817 F.2d 1188, 1192 (5th Cir. 1987). This is because "[o]nce the party seeking intervention has filed its motion to intervene with its proposed complaint, it has done all it can do, in a timely sense, to commence its action. The complaint cannot be filed until the court approves the intervention." This rule, as applied to post-judgment intervention to appeal, is consistent with *McDonald.*

When, as in this case, a person seeking to appeal an adverse class determination has filed her motion to intervene with her proposed notice of appeal, the bright line rule that the Court adopted in *McDonald* requires that the date of filing of the petition to intervene to appeal is to be deemed the date of filing of the notice of appeal that had been submitted as the proposed initial pleading with the petition to intervene.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

April, 2005

KENNETH N. FLAXMAN
200 South Michigan Avenue
Suite 1240
Chicago, Illinois 60604
Attorney for Petitioner

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-3780

LISA ELLIS, YVONNE MASON and DERRICK DENSON,
Plaintiffs-Appellees,

v.

NEVADA LANDING PARTNERSHIP, ELGIN RIVERBOAT RESORT, d/b/a/ GRAND VICTORIA RIVERBOAT and RGB LIMITED PARTERNERSHIP,
Defendants-Appellees.

APPEAL OF: TAMELA Q. SIMMONS, DOROTHY N. BURKS, KATRINA D. CURETON, et al.,
Intervening-Plaintiffs-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois
No. 98 CV 7093 —**Martin C. Ashman** *Magistrate Judge.*

ORDER

January 26, 2005

Honorable Frank H. Easterbrook, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge
Honorable Ilana Diamond Rovner, Circuit Judge

Appellants, sixteen members of the putative class, appeal from the final judgment entered in this action, in addition to several specified interlocutory decisions—the March 15, 2002, order refusing to enforce settlement, the August 21, 2003, order decertifying the class, and the October 8, 2003, decision delegating to plaintiff the duty

"to send notice of uncertified class to all members." The notice of appeal, however, is untimely.

Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal in a civil case be filed in the district court within 30 days of the entry of the judgment or order appealed. In this case judgment was entered on September 22, 2004, and the notice of appeal was filed on October 26, 2004, four days late. The district court has not granted an extension of the appeal period for the simple reason that appellants never asked the district court to do so (although this court suggested this course of action in its November 1, 2004, order), see Rule 4(a)(5), and this court, of course, is not empowered to extend the time to appeal, see Fed. R. App. P. 26(b). We further note that the parties make no argument that the papers filed by appellants on October 20, 2004, should be treated as a notice of appeal under *Smith v. Barry,* 502 U.S. 244 (1992).

This appeal is DISMISSED.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 98 C 7093

LISA ELLIS et al.,

Plaintiffs,

ELGIN RIVERBOAT
RESORT et al.

Defendants.

ORDER

I. Introduction

Plaintiffs Lisa Ellis, Marcia English, Derrick Denson and Yvonne Mason ("plaintiffs") have brought suit against Elgin Riverboat Resort d/b/a Grand Victoria Riverboat, Nevada Landing Partnership and RBG Ltd., ("defendants"), alleging violation of Title VII of the Civil Rights Act. The plaintiffs are African-Americans who applied for positions as dealers at the Grand Victoria Casino but were not offered positions. In the present motion the plaintiffs seek to have a class of individuals certified pursuant to Rule 23 of the Federal Rules of Civil Procedure. They seek to have certified the following proposed class:

> All African-Americans who were qualified for employment as "dealers" at the Grand Victoria casino, but who were not hired from December 25, 1997 to the present.[1]

The defendants oppose certification of the class, arguing

that the plaintiffs have failed to meet any of the requirements of Rule 23(a).

II. Discussion

Rule 23 of the Federal Rules of Civil Procedure provides a two-step analysis to determine whether class certification is appropriate. First, the plaintiffs must meet the four requirements of Rule 23(a): (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses or the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Failure to meet any one of these elements precludes certification of a class. *Retired Chicago Police Assn v. City of Chicago,* 7 F. 3d 584, 596 (7th Cir. 1993).

Second, the action must satisfy one of the conditions of Rule 23(b). The plaintiffs contend that they have satisfied Rule 23(b)(2), which states that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding

---

1. The plaintiffs initially proposed a class consisting of "all Black African-Americans who applied and were rejected for employment as dealers by Grand Victoria Casino, or were deterred from applying for employment from December 25, 1997 to the present." The plaintiffs proposed the narrower class definition in their Reply Brief.

declaratory relief with respect to the class as a whole."

The plaintiffs bear the burden of showing that class certification is proper. *Trotter v. Klincar,* 748 F.2d 1177, 1184 (7th Cir. 1984). If the party class certification meets each of the i certification requirements, the court must certify the proposed class. *Jefferson v. Windy City Maintenance, Inc.,* 1998 WL 474115, at *2 (N.D.III. Aug. 4, 1998). The court has broad discretion concerning whether a proposed class satisfies certification requirements, but should err in favor of maintaining class actions. Id.

In this case, plaintiffs' proposed class covers "[a]ll African-Americans who were qualified for employment as 'dealers' at the Grand Victoria casino, but who were not hired from December 25, 1997 to the present." The proposed class includes both those who applied for employment and were not hired, and those who were discouraged from applying.

A. Numerosity

1. Scope of the Class

Before reviewing the requirements of Rule 23, the court must as an initial matter review the scope of the proposed class. The plaintiffs contend that those qualified applicants who were deterred from applying for work with Grand Victoria should be included. The defendants argue that this proposed class is overbroad because it will be impossible to prove whether or not someone was deterred from applying at Grand Victoria due to an allegedly discriminatory hiring practice.

An identifiable class exists if its members can be ascertained by reference to objective criteria, but not if membership is contingent on the prospective member's

state of mind. *Elliot v. ITT Corp.*, 150 F.R.D. 569, 574 (N.D.III. 1992). When class membership depends upon an individual's state of mind, courts have typically found the class to be too indefinite. *Harris v. General Dev. Corp.*, 127 F.R.D. 655, 659 (N.D.III. 1989). "In attempting to cull the truly deterred applicants from such an expansive universe, a tremendous amount of valuable court a; time and resources would be consumed, placing a severe burden on the court and litigants." Id.

The proposed class is too indefinite because class membership depends upon an individual's state of mind. *See Harris,* 127 F.R.D. at 659 ("The proposed class of persons who allegedly were discouraged from applying at GDC is too imprecise and speculative to be certified."). However, it is within the court's discretion to limit or redefine the scope of the class. Id. Because of the speculative nature of the proposed class, the court will exercise its discretion a: and limit the class to those African-Americans who were qualified for employment as 'dealers' and applied for work as 'dealers' at the Grand Victoria casino, but were not hired from December 25, 1997 to the present.

The plaintiffs argue that the theory that the class should be limited to minority dealers who actually applied and were not hired has been "repeatedly rejected." In support of this contention they cite *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546 (5th Cir. 1986), and *Jones v. Firestone Tire and Rubber Co., Inc.*, 977 F.2d 527 (11th Cir. 1992). However, neither of these decisions addressed the issue of persons who were discouraged from applying for positions in the context of class certification under Rule 23, and the plaintiffs cite no cases that support their contention that those who

were discouraged from applying for work at Grand Victoria may be included to satisfy numerosity requirements. Such a contention is inconsistent with the law in this district. *See, e.g., Elliot,* 150 F.R.D. at 574; *Harris,* 127 F.R.D. at 659. *See also Rosario v. Cook County,* 101 F.R.D. 659, 663 (N.D.I11. 1983) (claims of representative parties who applied for promotion and were denied not typical of claims of parties who were discouraged from applying for promotion under Rule 23(a)(3)).

2. Speculation

The defendants argue that the plaintiffs' proposed class size is merely speculative. In their motion, the plaintiffs argue that the defendants employed 409 dealers, 24 of whom were African-American (5,87%). The plaintiffs contend that this percentage is far lower than at other casinos in the Chicagoland area, where African-Americans comprise 40% of the dealer workforce. Plaintiffs claim that but for the alleged discriminatory policy, it is likely that more than one hundred African-American dealers would be presently employed by Grand Victoria. The defendants counter that the plaintiffs offer no evidence supporting their numerosity argument, only the opinion of plaintiff Ellis.

"To satisfy this numerosity requirement, it is not necessary to determine the precise number of members in a proposed class; a reasonable estimate will suffice." *Dhamer v. Bristol-Myers Squibb Co.,* 183 F.R.D. 520, 525 (N.D.Ill. 1998) A putative class representative must provide some evidence as to the size of the class. *Narwick v. Wexler,* 901 F. Supp. 1275, 1278 (N.D.111. 1995) The plaintiffs cannot rely on conclusory allegations or speculation as to the size of the class in order to

prove numerosity. Id. A finding of sufficient numerosity can be based on i˜ common sense assumptions or reasonable inferences. *Marder v. Bank One Milwaukee,* 1995 WL 758413 (N.D.111. Dec. 15, 1995). The issue of whether the numerosity requirement is satisfied is extremely fact-specific. *Chandler v. Southwest Jeep-Eagle, Inc.,* 162 F.R.D. 302, 307 (N.D.111, 1995). In making this determination, the court is entitled to make common-sense assumptions. *Buyeks-Roberson v. Citibank Federal Savings Bank,* 162 F.R.D. 322, 329 (N.D.Il1, 1995).

The numerosity requirement should not be mechanically employed to defeat class certification in employment discrimination cases, because this type of suit "is necessarily a class action as the evil sought to be ended is discrimination on the basis of a class characteristic." *Bowe v. Colgate-Palmolive Co.,* 416 F.2d 711, 719 (7th Cir. 1969). *See Harris,* 127 F.R.D. at 660. "We recognize that 'suits alleging racial or ethnic discrimination are often by their very nature class suits, involving class-wide wrongs."' *Rosario,* 101 F.R.D. at 660-61 (quoting *East Texas Motor Freight Sys., Inc. v. Rodriguez,* 431 U.S. 395, 405 (1977)).

The plaintiffs' estimate of class size of one hundred does not satisfy the requirements of Rule 23(a)(1). The plaintiffs base their estimate of class size on statements by plaintiff Ellis. She stated in her deposition that she based this number on hearsay, and that she did nothing to determine whether her estimate was accurate. This is insufficient for establishing numerosity. A plaintiff need not plead an exact number of persons included in the proposed class, but conclusory allegations that joinder is impracticable and speculation as to class size are not

sufficient. *Shields v. Local 705, Intl Bhd, of Teamsters,,* 1996 WL 616548 (N.D.III. Oct. 23, 1996).

The plaintiffs do not dispute the lack of basis for Ellis' estimate. Instead, they counter in their Reply Brief with EEO reports from four of the seven casinos in the local area that show that 303 African-Americans work at these casinos. They argue that all of them would be interested in working at Grand Victoria because it pays a substantially higher wage. The defendants counter that this new estimate is unreasonable because it makes no effort to allege how many applied, or even considered applying, for employment with Grand Victoria. They further argue that the proposed class fails to consider whether any of the 303 are qualified to work at Grand Victoria.

The plaintiffs' estimate based on the total number of dealers at other casinos also does not satisfy the numerosity requirement. The plaintiffs merely rely on a conclusory allegation that because Grand Victoria pays dealers substantially more than other casinos, every African-Am dealer at the other casinos in the area would want to work there. The plaintiffs have made no attempt to make a reasonable estimate as to how many, if any, of these dealers actually applied for work at Grand Victoria. The plaintiffs' conclusory allegation here is wholly inadequate for establishing numerosity.

"When in doubt about numerosity, courts often certify the class, with the option under Fed.R.Civ.P. Rule 23(c)(1) of decertifying if it later appears that joinder was practicable." *Pennington v. Ward,* 1986 WL 8038, at *1 (N.D.Ill. July 14, 1986). In the present case, the plaintiffs may be able to demonstrate numerosity.

According the McGill affidavit, approximately 25% of its employees are dealers (409 of a workforce of over 1600). See McGill Aff at par.4. Grand Victoria received in excess of 2,100 applications for employment in 1998. Grand Victoria had exceeded that number of applications during the first eight months of 1999. McGill Aff. at par 5. It is therefore reasonable to assume that 25% of these 4,200+ applications, or at least 1,050, were for dealer positions. Presumably a number of these were from African-Americans qualified as dealers who were not offered employment. Although it is unclear whether the number is great enough to make joinder impracticable, the court finds that the plaintiffs have conditionally established numerosity. The court has the option under Fed.R.Civ.P. Rule 23(c)(1) of decertifying the class later, if a review of Grand Victoria's computer employment records demonstrates that joinder is practicable.[2]

3. Commonality

The plaintiffs next claim that the proposed class meets the commonality requirement of Rule 23(a)(2). The defendants argue that the plaintiffs have failed to

---

2. Grand Victoria has computer records of all people who applied for work at Grand Victoria. Although the records do not include the races of the applicants, they include addresses, phone numbers, positions applied for, and whether the applicants were ultimately hired. The number of African-American applicants qualified as dealers who applied for work as dealers and were not offered positions is thus ascertainable. See McGill Aff., par. 7.

allege a question of law or fact that is common to the claims of the named class members and the members of the putative class.

"Where a question of law refers to a standardized conduct of the defendants toward members of the proposed class, a common nucleus of operative facts is typically presented, and the commonality requirement of Rule 23(a)(2) is usually met." *Franklin v. City of Chicago,* 102 F.R.D. 944, 949 (N.D.Ill. 1984). All questions of law or fact need not be common among the class members; a single issue common to all class members will suffice for the commonality requirement. *Harris,* 127 F.R.D. at 661.

Here, the plaintiffs have met the commonality requirement. The plaintiffs allege racial discrimination in hiring, and "[djefendants' allegedly discriminatory conduct affected all members of the class in a similar fashion. As a consequence, most if not all of the elements of the resulting cause of action will be common to the class." *Harris,* 127 F.R.D. at 661. The plaintiffs' allegations satisfy the requirements of Rule 23(a)(2).

The defendants cite *Patterson v. General Motors Corp.,* 631 F.2d 476 (7th Cir. 1980), for the proposition that a class action is not appropriate in all instances in which discrimination in employment was racial, and that the claims of the individual members of the class are fact specific and require adjudication of individual facts. However, Patterson can be distinguished from the present case. The court in Patterson found that it was not a typical Title VII case, and that the facts alleged related solely to plaintiff's personal grievances. Id. at 480. In contrast, the plaintiffs here allege a policy of

discriminatory hiring policies, a fact which if proven is common to all claims. This is sufficient to meet the commonality requirement.

4. Typicality

The plaintiffs next argue that they have satisfied the typicality requirement of Rule 23(a)(3). The defendants claim that the claims are not typical because Grand Victoria's hiring decisions are made on a highly individualized basis, and that the major focus of the litigation will be on defenses unique to the named plaintiffs.

The typicality requirement is satisfied if the claims of the representative parties arise from the same event or practice or course of conduct that gives rise to the claims of the other class members, and if the claims are based on the same legal theory. *Harris,* 127 F.R.D. at 661. Typicality is not defeated by factual distinctions between the named plaintiffs and those of other class members. *Orlowski v. Dominick's Finer Foods, Inc.,* 172 F.R.D. 370, 374 (N.D.III. 1997). Also, typicality is determined with reference to the defendant's actions towards the plaintiff class, not particularized defenses against individual class members. *Wagner v. NutraSweet Co.,* 95 F.3d 527, 534 (7th Cir. 1996).

The plaintiffs have satisfied the typicality requirement. All claims of the named plaintiffs arise from the same course of conduct that gives rise to the claims of the other class members, namely, Grand Victoria's discriminatory hiring practices. Furthermore, the claims are based upon the same legal theory under Title VII. All four named plaintiffs are African-Americans who allege that they applied for positions at Grand Victoria as dealers but were not hired. This is sufficient to establish typicality.

5. Adequate representation

The plaintiffs next claim that they have satisfied the requirements of Rule 23(a)(4). They argue that the named plaintiffs do not have interests that are antagonistic to those of the class. The defendants counter that the claims of the named plaintiffs are potentially antagonistic, and as a result the requirement for adequate representation is not met.

A class is not fairly and adequately represented if the class members have antagonistic or conflicting claims. *Rosario v. Livaditis,* 963 F.2d 1013, 1018 (7th Cir. 1992). The defendants claim that the plaintiffs' claims are potentially antagonistic. However, the court finds this contention to be without merit. The defendants offer mere speculation that the claims are "potentially" antagonistic, and they "cannot destroy the certification of the class if the basis of their conflict with the class' claims is speculative." Id. at 1019. The court finds that the plaintiffs have satisfied the requirements of Rule 23(a).

B. Rule 23(b)

In addition to satisfying the requirements of Rule 23(a), the plaintiffs also must satisfy one of the requirements of Rule 23(b). The plaintiffs contend in their motion that they have satisfied the requirements of Rule 23(b)(2). The defendants do not dispute this contention, so the class will be certified under Rule 23(b)(2).[3]

---

3. The plaintiffs also make reference to Rule 23(b)(3) in their reply brief. However, at no point do they argue that they have satisfied the requirements of this rule, so the court will not address the issue of class certification under Rule 23(b)(3).

III. Conclusion

The plaintiffs' motion for class certification [8-11 is granted with modification, and the court certifies the following class:

> All African-Americans who were qualified for employment as "dealers" who applied for positions as "dealers" at the Grand Victoria casino, but who were not hired from December 25, 1997 to the present.

ENTER:

/s/ Joan B. Gottschall
United States District Judge

DATED: March 27, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 98 C 7093

[title omitted in printing]

ORDER DENYING RECONSIDERATION

With one exception, defendants' sur-reply makes no arguments that were not previously made in their original response to plaintiffs Motion to Authorize Class Notice to Class Members Who Applied On or After June 20, 2000. The defendants advance three reasons for denying plaintiffs' motion — all three of which were presented in the defendants' response brief. The court fully considered these reasons and found them unpersuasive. The one portion of the surreply that is not a rehash of old arguments is the portion responding directly to the list of cases cited by plaintiffs in their reply brief. (Sur-Reply at 12). Defendants argue that these cases do not establish a general rule that class closing dates should extend into the future in employment discrimination cases. Defendants correctly point out that some of the cases cited by plaintiff are misidentified, and some are not employment cases. Defendant also characterizes nearly all of these cases as challenging concrete, specific employment policies or practices, although defendant never cites a case suggesting that future cut-off dates are appropriate only where the plaintiffs are challenging a concrete employment practice.[1] But the court's 6/28/01 order did not rely on the cases

---

1. In fact, the one case cited by the court in the 6/28/01 order was a case involving broad, generalized allegations of discrimination in hiring practices, rather than more

cited by plaintiffs as establishing a general rule that should be followed in this case. Rather, the court cited one case, *Local 194, Retail Wholesale & Dep't Store Union v. Standard Brands, Inc.*, 85 F.R.D. 599, 610-11 (N.D. Ill. 1979), for the proposition that utilizing future cut-off dates is permissible, and then stated that so long as the allegedly improper practices continue, the class should logically include those affected by that practice.[2] The court noted that the future date on which the challenged practices cease bears a more logical relationship to the proper class closing date than does the date on which the class was certified. That remains true, and, in this court's opinion, none of defendants' arguments (old or new) are sufficient to overcome that observation.

---

narrow challenges to hiring practices. *See Local 194, Retail Wholesale & Dep't Store Union v. Standard Brandy, Inc.*, 85 F.R.D. 599, 610-11 (N.D. Ill. 1979).

2. The court did alter this date somewhat, to permit defendants an opportunity to discover any necessary information about new class members added just before trial. Thus, the class closing date was set to a date two weeks prior to the scheduled pre-trial conference in this action.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 98 C 7093

[title omitted in printing]

MEMORANDUM OPINION AND ORDER

ASHMAN, United States Magistrate Judge.

I. Introduction

Plaintiffs, Lisa Ellis, Marcia English, Yvonne Mason and Derrick Denson (collectively referred to as "Ellis" or "Plaintiffs"), filed a putative class action suit alleging that the defendants, Elgin Riverboat Resort d/b/a Grand Victoria Riverboat, Nevada Landing Partnership, and RBG, Ltd. (collectively referred to as "Elgin") engaged in a pattern and practice of discriminatory hiring based on race, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e. For relief, Ellis requested both declaratory and injunctive relief, as well as back pay and benefits for the named plaintiffs. On March 27, 2000, Judge Gottschall certified the class pursuant to Federal Rule of Civil Procedure 23(b)(2). Presently before this Court is Elgin's motion to decertify the class or to limit the scope of the class to those applicants whom Grand Victoria invited to audition for a dealer position.[1]

---

1. The parties have consented to have this Court conduct any and all proceedings in this case, including the entry of final judgment. See 28 U.S.C. § 636(c); Local R. 73. 1(b).

II. Background

Grand Victoria is a state-licensed gambling facility located in Elgin, Illinois. It employs approximately four hundred dealers, all of whom deal at least one of the following games: craps, blackjack and roulette, as well as games such as baccarat and Caribbean stud poker. Prospective dealers may apply to the casino in a number of ways: after retrieving a written application from the Human Resources Department or from an adjacent building (until November 2002), applicants may return the application to a Human Resources clerk, drop the application in a designated drop box on the boat or in the accounting hallway, or return the application by mail. (McGill Aff. par. 4.) Beginning in July 2001, applicants could complete the application online. (Id.).[2] When a Human Resources clerk receives a written application directly from an applicant, the clerk completes a Pre-Employment Screening Tool, which asks for the applicant's name, whether the applicant has previously applied to or been employed at the Grand Victoria and if so, the date of such application or employment. The Screening Tool further requires clerks to rate, on a scale

---

2. The plaintiffs contend that Elgin requires all applicants to apply in person. (Pls.' Opp'n Mem. at 11.) However, the deposition pages the plaintiffs reference do not specifically support the assertion. Both Penson's and McGill's deposition excerpts explain what the Human Resources clerks do when an individual applies in person, but are silent about whether an applicant may only apply in person.

of 1-5, their impression of the applicant on whether the applicant seems friendly, helpful, courteous, eager to please, and whether the applicant presents a neat and clean appearance.

Thereafter, clerks process the applications and forward them to a Human Resources manager for initial screening.[3] Over the course of the class period three assistant managers have been responsible for screening, each of whom determined whether the application was complete, reviewed the applicant's job history including prior employment with Grand Victoria, and looked for large unexplained gaps in the applicant's employment history. Beyond these characteristics, individual screeners focused on different aspects of the application when evaluating the applicant: Lennor Penson focused on applicants' previous employment and eligibility for rehire, while Zaara Norten focused on applicants' record of job stability. If the Human Resources manager approves the application, the department holds the application until the Casino Manager or one of his staff notifies Human Resources that the casino has openings for the dealer position. When such dealer positions become available, Casino Manager Michael Graninger further screens applications to determine which applicants he will invite to audition. Graninger, a native of Washington, D.C., reviews the second page of the application to assess the applicant's level of dealing

---

3. Human Resources Manager Sharon McGill has almost always delegated screening to an assistant manager.

experience and job stability. Graninger often reviewed applications with Julian Thompson, employed during the class period first as the Pit Boss and later as Shift Manager. If the applicant included on the application the name of a friend or relative who worked at Grand Victoria and referred him or her to the casino, Thompson often asked the employee whether the applicant was a skilled dealer. The referral was also important to the employee, because under the "Bring a Friend" program the referring employee received a $250 bonus for referring an applicant whom the casino hired and who remained employed for at least six months.

Graninger instructed Shift Managers and, occasionally, Pit Managers to invite those applicants who survived the second level of screening to audition for a dealer position. During the class period five shift managers and at least two Pit Managers have conducted dealer auditions and independently determined which applicants pass. The decisionmakers base their decisions on the applicant's 1) knowledge of the game, procedures and payoffs; 2) neatness and accuracy in shuffling and dealing; 3) full awareness of all players at the gaming table; and 4) ability to interact well with the customers.[4] If the applicant passes the audition, he or she will be

---

4. Plaintiffs claim that Defendants did not have standards for dealers, and that dealers were required only to "know the layout and smile." (Pls.' Opp'n Mem. at 9.) However, Ms. Ellis' deposition confirms that dealers were required to know the game and interact well with customers. (Ellis Dep. at 46.)

hired pending a drug test and a criminal background check.

On July 12, 1998, Plaintiffs Lisa Ellis and Marcia English applied in person for dealer positions at the Grand Victoria. Ellis worked for Grand Victoria twice previously, once for a period of several months in 1994 and 1995, and again for one week in December 1995. Shortly after applying, Ellis received notice that Grand Victoria rejected her application and would keep her application on file for thirty days. On August 11, 1998, Ellis spoke with Pit Boss Kevin Schmieder, who advised her that dealer positions were available and suggested that she attend the dealer auditions the following day. He instructed Ellis to inform Julian Thompson that Schmieder told her to audition despite her initial rejection.

Within a few days of applying, English received an invitation from Thompson to audition at the casino. English informed Thompson that she worked as a full-time Chicago public school teacher and therefore requested only part-time employment. Thompson told her that was okay and instructed her to audition anyway.

On August 12, 1998, Ellis and English arrived with Plaintiff Yvonne Mason to audition for dealer positions. Mason had not yet submitted a written application, but knew Thompson and hoped that he would permit her to audition that day. Mason filled out an application and Thompson informed her that, according to Grand Victoria's rules, she could not audition on the same day she applied for employment, but that she could audition the following week. Thompson also informed Ellis that because she was not invited to the audition he would

audition her last. Ellis and English auditioned with a group of four Caucasian women, one Caucasian man, and one Asian woman. The first group of auditions lasted between forty-five minutes and one hour while the second group of auditions (of which English and Ellis were a part) lasted only a few minutes, ostensibly because the casino personnel needed to board the boat.[5] Grand Victoria did not hire Ellis, English or Mason.

On or about November 15, 1998, Derrick Denson submitted an application and resume to a clerk in Grand Victoria's Human Resources department. Grand Victoria did not invite Denson to audition for a dealer position.

On November 6, 1998, Plaintiffs filed a complaint alleging that Elgin Riverboat Resort d/b/a Grand Victoria Riverboat, Nevada Landing Partnership, and RBG, Ltd. engaged in a pattern or practice of hiring discrimination based on race, in violation of Title VII of the Civil Rights Act.[6] The plaintiffs sought class certification under Rule 23 of the Federal Rules of Civil Procedure. Judge Gottschall certified as a class "those African-Americans who were qualified for employment as 'dealers' and applied for work as 'dealers' at the Grand Victoria casino, but were not hired from December 25, 1997 to the present." However, because class size is

---

5. One additional applicant, an Asian woman, auditioned with the second group.

6. Plaintiffs filed an Amended Complaint on July 7, 1999, following Yvonne Mason's death. The Amended Complaint added Denson as a named plaintiff.

often speculative during the early stages of litigation, Judge Gottschall certified the class on the express condition that the plaintiffs be able to satisfy Rule 23(a)'s numerosity requirement. (Order granting class certification at 7.) Finding that Plaintiffs satisfied the remainder of Rule 23(a)'s requirements, Judge Gottschall certified the class under Rule 23(b)(2). (Id. at 10.)

On February 7, 2003, after nearly three years of discovery, Defendants filed a Motion to Decertify or, in the Alternative, Modify the Class.[7] During discovery, Plaintiffs identified sixty class members (including the named plaintiffs) and both parties took numerous depositions of class members and Elgin employees, and propounded interrogatories.

III. Discussion

A. Standard of Review

In deciding a motion to decertify a class, the court tests whether economy favors adjudicating multiple disputes in a single action, without sacrificing fairness. *Gen. Tel. Co. of the Southwest v. Falcon,* 457 U.S. 147, 155 (1982) (quoting *Califano v. Yamasaki,* 442 U.S. 682, 700-01, (1979)). To proceed as a class action the plaintiffs must first establish: (1) that members of the class are "so numerous that joinder of all members is impracticable;" (2) that "there are questions of law or fact common to the class;" (3) that the claims or

---

7. On February 18, 2003, Elgin filed a Revised Memorandum of Law in Support of Motion to Decertify the Class.

defenses of the class representative are "typical of the claims or defenses of the class;" and (4) that the class representative "will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a).[8] Further, the class representative must satisfy a provision of Rule 23(b). *Rosario v. Livaditis,* 963 F. 2d 1013, 1017 (7th Cir. 1992); *Patrykus v. Gomilla,* 121 F.R.D. 357, 360 (N.D.Ill. 1988).[9] Failure to satisfy any of these requirements precludes class certification. *Harriston v. Chi. Tribune Co.,* 992 F. 2d 697, 703 (7th Cir. 1993) (quoting *Valentino v. Howlett,* 528 F. 2d 975, 978 (7th Cir. 1976)). The court enjoys "broad discretion" in determining whether the plaintiffs have satisfied their burden. *Keele v. Wexler,* 149 F.3d 589, 592 (7th Cir. 1998) (citing *Mira v. Nuclear Measurements Corp.,* 107 F.3d 466, 474 (7th Cir. 1997)).

Initially, a court determining whether to certify a class must generally accept as true the allegations in support of certification rather than examine the merits of the case. *Retired Chi. Police Ass'n v. City of Chicago,* 7 F.3d 584, 598 (7th Cir. 1993) ("Retired Police Ass'n I").

---

8. These elements are otherwise referred to as numerosity, commonality, typicality, and adequacy of representation.

9. Judge Gottschall certified the class under 23(b)(2), which requires that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole...." Fed.R.Civ.P. 23(b)(2).

However, because "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action," the court must sometimes "probe behind the pleadings before coming to rest on the certification question." *Falcon,* 457 U.S. at 160 (quotations omitted). Because the court must decide whether to certify a class early in the proceedings,[10] it remains under a continuing obligation to review whether proceeding as a class action is appropriate, and may modify the class or vacate class certification pursuant to evidentiary developments arising during the course of litigation. *Eggleston v. Chi. Journeymen Plumbers' Local Union No. 130,* 657 F. 2d 890, 896 (7th Cir. 1981); *Binion v. Metro. Pier & Exposition Auth.,* 163 F.R.D. 517, 520 (N.D.Ill. 1995) (citing *Falcon,* 457 U.S. at 160) (explaining that the court "remains free" to modify or vacate certification if developments in class litigation so require). Thus, the court's initial certification of a class "is inherently tentative." *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 469 n. 11 (1978). *See also Stastny v. S. Bell Tel. & Tel. Co.,* 628 F. 2d 267, 275-76 (4th Cir. 1980) (explaining that pretrial litigation may reveal that a plaintiff cannot satisfy commonality factors, requiring the court to decertify the class); *In re Gen. Motors Corp.,* 55 F.3d 768, 792 n. 14 (3d Cir. 1995) (noting that all class actions are necessarily "conditional" because under Fed.R.Civ.P. 23(c)(1)

---

10. Fed.R.Civ.P. 23(c)(1) requires the court to rule on class certification as soon as practicable after the complaint is filed.

courts may modify or decertify a class until final judgment on the merits). The party seeking class certification bears the burden of demonstrating that initial certification is appropriate, *Retired Police Ass'n I,* 7 F.3d at 596, and likewise on a motion to decertify the class, bears the burden of producing a record demonstrating the continued propriety of maintaining the class action, *Stastny,* 628 F. 2d at 277.

Ellis characterizes Elgin's motion to decertify the class or to limit the class as a motion to reconsider Judge Gottschall's class certification, which Ellis argues was conditional only with respect to numerosity. Relying on *Gary v. Sheahan,* 188 F.3d 891 (7th Cir. 1999) and on *Best v. Shell Oil Co.,* 107 F.3d 544 (7th Cir. 1997), Ellis asserts that this Court is bound by the law of the case doctrine and may only decertify the class if presented with new law or clear error. However, Ellis' reliance on *Gary* and *Best,* and on the law of the case doctrine, is misplaced. First, *Gary* is distinguishable because the Gary court faced a completely different procedural posture: the court did not face a motion to decertify a class but a defendant's attempted interlocutory appeal of the district court's denial of its motion to decertify the class. *Gary,* 188 F.3d at 893. Ellis therefore takes out of context the *Gary* court's labeling as a motion to reconsider the defendant's motion to decertify the class. The Seventh Circuit treated the two motions as one and the same to stress that despite the label chosen by a party, Rule 23(f)'s prescribed ten-day filing limit on interlocutory appeals still applies.

Second, Elgin's motion is not a motion to reconsider requiring a heightened standard of review under the law of the case doctrine, but is instead a motion to decertify

based on evidence developed and revelations produced during three years of discovery and pretrial litigation. *See Williams v. Comm'r of Internal Revenue,* 1 F.3d 502, 503 (7th Cir. 1993) ("[T]he second judge may alter previous rulings if new information convinces him that they are incorrect, but he is not free to do so ... merely because he has a different view of the law or facts from the first judge.") As previously discussed, class certification, modification, and decertification are discretionary. Rule 23 clearly requires this Court to review the propriety of class certification in light of new evidence and pretrial litigation, regardless of which judge initially certified the class. *See, e.g. Toney v. Rosewood Care Center, Inc.,* No. 98 C 693, 2001 WL 322413, at *1-3 (N.D.Ill. Mar. 13, 2001) (on a motion to decertify the class, the court analyzed the defendant's arguments and did not employ a heightened standard in reviewing the propriety of maintaining a class which had been previously certified by a different judge).

Finally, assuming the law of the case doctrine did apply, this Court's review of the defendant's motion is appropriate. The law of the case doctrine requires the court to adhere to previous rulings absent a compelling reason, "such as an intervening change of law or newly discovered evidence, to examine them." *SmithKline Beecham Corp. v. Apotex Corp.,* 247 F.Supp. 2d 1011, 1014 (N.D.Ill. 2003) (emphasis added). Given the intervening three years of discovery between Judge Gottschall's initial class certification and the instant motion, the parties present this Court with new evidence, i.e., information regarding the proposed class members, and information gleaned from depositions and affidavits, requiring review to determine if the class certification

remains appropriate.

B. Title VII

Just as Ellis bears the burden of satisfying the requirements of Rule 23(a), Ellis also bears the initial burden to establish a violation of Title VII. *See Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 336 (1977). The plaintiffs allege that Grand Victoria engaged in a pattern or practice of discriminatory hiring. To establish their Title VII claim, Plaintiffs may proceed under either a disparate treatment or a disparate impact theory. Id. at 335 n. 15.[11] "To establish a pattern or practice claim [under a disparate treatment theory], the plaintiffs must prove that intentionally discriminatory practices were the defendant's 'standard operating procedure,' not merely sporadic or isolated occurrences." *Taylor v. D.C. Water & Sewer Auth.,* 205 F.R.D. 43, 46 (D.D.C. 2002) (quoting *Int'l Bhd. of Teamsters,* 431 U.S. at 336. To do so, Plaintiffs may either offer direct evidence of intentional discrimination, or may offer evidence of a combination of circumstances from which a court or jury may infer discriminatory intent. *See Randle v. LaSalle Telecomms., Inc.,* 876 F. 2d 563, 569 (7th Cir. 1989). On the other hand, under a disparate impact

---

11. Individual plaintiffs alleging a Title VII violation and proceeding under a disparate treatment theory may offer either direct evidence of intentional discrimination or may proceed under the burden-shifting analysis established by the Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973). *Randle v. LaSalle Telecomms., Inc.,* 876 F. 2d 563, 569 (7th Cir. 1989).

theory of liability Plaintiffs need not prove that Defendant intentionally discriminated; rather, Plaintiffs need only show that Defendant's facially neutral actions adversely affected a group protected by Title VII. *See Int'l Bhd. of Teamsters,* 431 U.S. at 335 n. 15. Because racial discrimination in violation of Title VII is by its nature class discrimination, Title VII claims are particularly suited to proceed as a class action. *Falcon,* 457 U.S. at 157. Nevertheless, the Supreme Court has repeatedly insisted that despite this obvious affinity, courts must rigorously enforce the prerequisites of Rule 23(a) before allowing a plaintiff's claim to proceed as a class action. Id. Thus, the determination of whether the action should proceed as a class requires this Court to answer "the substantive question whether, under either of the available theories, there exists the requisite 'pattern or practice' sufficiently and comparably affecting an identifiable class of protected employees." *See Stastny,* 628 F. 2d at 274.

The representative plaintiffs allege that Elgin engaged in a pattern or practice of intentional discrimination against African American applicants, and therefore claim that Elgin violated Title VII under a disparate treatment theory of liability. Elgin urges this Court to decertify the class because the plaintiffs do not satisfy Rule 23(a)'s numerosity requirement for the class as a whole, and fail to establish a pattern or practice of discrimination and therefore cannot satisfy Rule 23(a)'s commonality, typicality, or adequacy of representation requirements. Alternatively, Elgin argues that this Court should limit the class to those applicants who auditioned, in which case the modified class cannot satisfy the numerosity requirement.

C. Prerequisites to Class Certification Under Rule 23(a)

Because Plaintiffs, in "seeking to maintain a class action under Title VII must meet 'the prerequisites of numerosity, commonality, typicality, and adequacy of representation' specified in Rule 23(a)," this Court will discuss each element in turn. *See Falcon, 457 U.S. at 156 (quoting Gen. Tel. Co. of the Northwest v. E.E.O.C., 446 U.S. 318, 330 (1980)).*

1. Numerosity

Rule 23(a)(1) requires that the class be so numerous to render joinder of all class members impracticable. "Impracticability does not mean impossibility, but instead requires plaintiffs to prove that it would be inconvenient and difficult to join all proposed members of the class." *Bethards v. Bard Access Sys., Inc.,* No. 94 C 1522, 1995 WL 75356, at *3 (N.D.Ill. Feb. 22, 1995). Although plaintiffs may not rely on conclusory allegations or on speculation regarding class size, they need not reach a threshold number of claims. *Allen v. City of Chicago,* 828 F.Supp. 543, 550 (N.D.Ill. 1993) (citations omitted). *See also, e.g. Gaspar v. Linvatec Corp.,* 167 F.R.D. 51, 56 (N.D.Ill. 1996) (noting that a small class does not preclude certification because of failure to satisfy numerosity, and citing cases with similarly small classes). Indeed, courts need not consider solely the number of potential class members when evaluating whether a plaintiff satisfies the numerosity requirement. *Gaspar,* 167 F.R.D. at 56.

To determine whether joinder is impracticable courts must consider the circumstances unique to each case. *Patrykus,* 121 F.R.D. at 361 (citing *Swanson v. Am. Consumer Indus.,* 415 F. 2d 1326, 1333 (7th Cir. 1969)). Such circumstances include whether class members are able to bring individual suits; whether it is judicially

efficient for the court to try such individual suits; and the geographical dispersion of class members. *Gaspar*, 167 F.R.D. at 56. For example, if class members are dispersed across a vast geographic area, joinder is less practicable. *See e.g. Betts v. Sundstrand Corp.*, No. 97 C 50188, 1999 WL 436579, at *5 (N.D.Ill. June 21, 1999) (explaining that the "lack of geographic dispersion" of class members "weighs against" class certification because joinder impracticability decreases where all class members can be found within the same judicial district). Additionally, while injunctive and declaratory relief contribute to satisfying numerosity, requests for monetary relief detract from a finding that plaintiffs satisfy numerosity. Id. *See also Stambaugh v. Kan. Dep't of Corr.*, 151 F.R.D. 664, 673 (D.Kan. 1993) (noting that courts consider "the inconvenience or inefficiency in trying individual suits, the ability of class members to bring their own suits, the size of the individual claims, a request for injunctive or declaratory relief, the nature of the relief sought, and the location and distribution of class members" in evaluating numerosity).

Ellis contends that the plaintiffs satisfy the numerosity requirement because the class presently contains sixty members and will increase while the class period remains open. However, Elgin claims that seven putative class members must be excluded from the class because they do not meet the class definition's requirements. Six members had no prior dealing experience, and one of those six does not appear to be African American. A seventh putative class member failed the casino's and the IGB's mandatory drug screening. Additionally, Ellis claims that joinder is impracticable because twenty-three class members live outside Illinois,

while Elgin counters that joinder is in fact practicable because with few exceptions, the class members reside in the Chicago metropolitan area.

This Court finds that joinder is impracticable. The plaintiffs seek injunctive and declaratory relief, as well as back pay and therefore the relief sought neither favors nor disfavors a finding that the plaintiffs satisfy numerosity. However, even assuming that seven class members should be excluded for failure to meet the class requirements, thereby limiting the class to fifty-three members who are not geographically dispersed,[12] joining such a large number of cases would unduly burden the court and defeat Rule 23's underlying purpose of promoting judicial efficiency and economy. Moreover, courts have held that smaller classes satisfy Rule 23(a)'s numerosity requirement. *See e.g. Riordan v. Smith Barney,* 113 F.R.D. 60, 62 (N.D.Ill. 1986) (compiling cases noting that classes of 10-40 members satisfy numerosity); *In re Bank One Sec. Litig.,* No. 00 CV 0767, 2002 WL 989454, at *3 (N.D.Ill. May 14, 2002) (noting that

---

12. Three of the sixty identified class members live a great distance from the Chicago metropolitan area (Shreveport, Louisiana; New Albany, Indiana; and Las Vegas, Nevada) and only two class members live more than one hundred miles from Chicago (Rock Island, Illinois and Saukville, Wisconsin). The remaining class members reside less than forty-five miles from Chicago. According to Elgin's list of class members, one class member's address is unidentified. (App. of Exs. in Supp. of Defs.' Mot. to Decertify the Class, Ex. N.)

"[c]ourts in this district have granted class certification to groups smaller than 30"). Therefore, because joinder is impracticable, the Court finds that the plaintiffs satisfy Rule 23(a)'s numerosity requirement.[13]

2. Commonality

Turning to the next prerequisite for maintaining the class certification, Rule 23(a)(2) requires questions of law or fact common to the class. Factual variations among class members' grievances will not defeat commonality. *Keele,* 149 F.3d at 594. Therefore, the parties need not share a complete identity of factual or legal issues. *Riordan,* 113 F.R.D. at 63. Generally, "[a] common nucleus of operative fact is ... enough to satisfy the commonality requirement of Rule 23(a)(2)." *Keele,* 149 F.3d at 594 (quoting *Rosario,* 963 F. 2d at 1018). A common nucleus of operative fact is usually found where "the defendants have engaged in standardized conduct towards members of the proposed class...." Id. Thus, racial discrimination in an employment context, arising out of the employer's standard operating procedure, is well-suited to class adjudication. *Falcon,* 457 U.S. at 157. However, the Supreme Court in Falcon explained that a party attempting to maintain a pattern or practice discrimination class action must demonstrate more than shared membership in a protected class, but must offer sufficient evidence to bridge the gap between his or her

---

13. Elgin's alternative argument, that changing the class definition would defeat numerosity, does not need to be addressed, because as discussed below, Ellis fails to meet the other requirements of Rule 23(a).

own individual claim and those of the class members who suffered the same injury. Id.

Elgin urges this Court to decertify the class because the plaintiffs have not established that Grand Victoria engaged in a pattern or practice of discriminatory hiring sufficient to satisfy Rule 23(a)'s commonality requirement. Elgin raises a two-pronged argument. First, it argues that Grand Victoria's decentralized hiring procedure necessitates an individualized inquiry into each decisionmaker's role in the decision not to hire each class member, thereby preventing the existence of an issue of fact common to each class member. Second, Elgin argues that each class member possessed different qualifications (or a lack thereof), requiring a similar individualized inquiry for each class member and similarly precluding a common issue of fact for the class.

In response, Plaintiffs assert that the issue of law common to the class is the alleged pattern or practice of discrimination. Plaintiffs further assert that because this is a motion to decertify the class rather than a trial on the merits, they need not detail all of their evidence supporting their allegation that Elgin engaged in a pattern or practice of discriminatory hiring. Finally, Plaintiffs rely on Judge Gottschall's order certifying the class, which held that Plaintiffs' allegation that Elgin engaged in a pattern or practice of discrimination, if proven, satisfies the commonality requirement as a question of law or fact common to the entire class. However, because the parties must strictly adhere to Rule 23's requirements at all times, Plaintiffs bear the continued burden of producing a record to answer questions about whether the evidence justifies maintaining the class action. *See Stastny,* 628 F. 2d at 277.

In a Title VII action, the commonality element is the "most critical" and one in which "the class action and merit inquiries essentially coincide." *Stastny,* 628 F. 2d at 274. As the Supreme Court explained:

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a [position] on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims. For [plaintiffs] to bridge that gap, [they] must prove much more than the validity of [their] own claim[s].

Falcon, 457 U.S. at 157-58. To bridge the gap between Plaintiffs' individual claims and the claim that Elgin engaged in a pattern or practice of discrimination adversely affecting all class members, Plaintiffs must provide sufficient proof to "justif[y] a rebuttable inference" that Elgin's " 'standard operating procedure' " proceeded from an intention to discriminate against the plaintiffs and class members based on their race. *See Stastny,* 628 F. 2d at 273 (quoting *Int'l Bhd. of Teamsters,* 431 U.S. at 336).

Thus, the inquiry into whether the plaintiffs meet the commonality requirement (and to some extent the typicality and adequacy of representation requirements)[14]

necessarily overlaps with the merits of the plaintiffs' claim that Elgin engaged in a pattern or practice of discrimination. The Seventh Circuit endorses such a limited inquiry into the merits and has explained that in determining whether a to certify a class, a court must "receive evidence" and resolve factual and legal disputes relative to whether the plaintiff meets Rule 23's requirements. *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001). After *Falcon*, a plaintiff must make "a specific showing of underlying facts which might raise an inference of a common question of pattern and practice through allegations of specific incidents of discrimination, supporting affidavits," or statistical evidence. *Alba Conte & Herbert B. Newberg*, Newberg on Class Actions § 24:21 (4th Ed. 2002). Therefore, Plaintiffs must support their allegations of a pattern or practice of discrimination "with affidavits or other evidence, particularly statistics, [to] raise an inference of across-the-board discrimination." *See Ploog v. Homeside*

---

14. The Falcon court explained that the commonality and typicality elements tend to merge because both guide the court's determination of whether it is economical to maintain the class action and whether there exists a sufficient nexus between the plaintiff's claim and those of the class members such that the plaintiff will protect the class members' interests. The Court further explained that the requirements similarly merge with the adequacy of representation requirement. *Falcon*, 457 U.S. at 158 n. 13.

Lending, Inc., 2001 WL 987889, at * 7 (N.D.Ill. 2001) (citing *Falcon*, 457 U.S. at 159 n. 15). *See also Abram v. United Parcel Serv. of Am., Inc.*, 200 F.R.D. 424, 428-33 (E.D.Wis. 2001); *Zapata v. IBP, Inc.*, 167 F.R.D. 147, 158-59 (D.Kan. 1996); *De La Fuente v. Chi. Tribune Co.*, No. 84 C 4596, 1985 WL 2103, at *2-8 (N.D.Ill. July 24, 1985).

3. Decentralized Hiring

Thus it is appropriate for this Court to analyze the evidence the parties provide with respect to the alleged discriminatory hiring pattern or practice. Commonality is relatively easily satisfied when a single individual or a small, centralized group makes decisions. *Abram*, 200 F.R.D. at 432 (citing *Rossini v. Ogilvy & Mather, Inc.*, 798 F. 2d 590, 598 (2d Cir. 1986)). For example, the Second Circuit in Rossini explained that plaintiffs in a sex discrimination class action sufficiently alleged that the defendant discriminated against them when a small, central group of decisionmakers assigned the plaintiffs "to departments or tasks within departments dealing with what was viewed by the assigning officials as 'women's work.' " 798 F. 2d at 599. The court held that the plaintiffs satisfied Rule 23(a)'s commonality requirement because "[c]ommon issues of law and fact would necessarily be involved in proving the existence and functioning of that system." Id.

On the other hand, a decentralized hiring procedure, which allows decisionmakers to consider subjective factors, supports individual claims of discrimination but cuts against the assertion that an employer engages in a pattern or practice of discriminatory hiring as a standard operating procedure. *Stastny*, 628 F. 2d at 279. Therefore, "the question is whether the decision making processes within [Grand Victoria] permit a common

pattern or practice of discrimination to occur therein." *See Rosenberg v. Univ. of Cincinnati,* 654 F.Supp. 774, 778 (S.D.Ohio 1986). In order to permit such a pattern or practice, the decisionmaking must be sufficiently centralized and the decisions themselves must be sufficiently objective to form part of the company's standard operating procedure. For example, in *Rosenberg* the court held that a university's decisionmaking process was too decentralized for discriminatory decisions to be part of a pattern or practice of discrimination because each department established its own policies, and thus the plaintiffs alleging that the university engaged in discriminatory employment practices could not establish commonality and maintain their class action. Id. at 780. In *Rosenberg,* the plaintiffs presented affidavits detailing their individual experiences and allegations of discrimination, along with a statistical analysis, university regulations, affirmative action policy statements, and letters and memos relevant to one plaintiff's claim. Id. at 779-80. The court held that, even accepting all of the plaintiffs' allegations as true, "nothing in [the] evidence tend[ed] to show that [the] violations [arose] out of a common pattern or practice based upon centralized decisionmaking...." Id. at 780.

Similarly, in Stastny, the court held that the plaintiffs offered insufficient evidence to justify an inference that the employer engaged in a pattern or practice of decisionmaking sufficient to establish the existence of a common question of law or fact. *Stastny,* 628 F. 2d at 280. The plaintiffs alleged that the defendant employer discriminated on the basis of sex. Id. at 270. The case proceeded to trial, during which the named plaintiffs offered their own testimony as well as testimony by a

former general manager from the defendant's North Carolina facility, regarding the company's employment practices. Id. In addition, the plaintiff offered statistical evidence and the opinion of a statistical expert, suggesting that a disproportionately low number of female employees occupied management positions. Id. The defendant appealed the district court's finding that the defendant engaged in a pattern or practice of discrimination, arguing that the plaintiffs failed to satisfy the requirements of Rule 23(a) and (b). Id. at 272. The Fourth Circuit reversed, holding that the plaintiffs failed to meet those requirements. Id. at 272-73. The court explained that the plaintiffs could have offered sufficient evidence of a pattern or practice of discrimination common to a multi-facility employer in one of three ways: first, they could have offered "evidence of a sufficient number of instances of similar discriminatory treatment experienced by individuals throughout a multi-facility enterprise." Id. at 278. Second, the plaintiffs could have offered statistical data to justify the inference. Id. Third, the plaintiffs could have offered direct evidence or an admission by the defendant that it intentionally engaged in a system-wide practice of discrimination. Id. The court held that the plaintiffs' evidence, which indicated "almost complete local autonomy in the local facilities," failed to overcome the presumption against commonality by any of these methods. Id.

Ellis similarly fails to establish commonality. Before turning to the plaintiffs' evidence, however, it is helpful to outline the evidence Elgin provides in support of its motion to decertify the class. Elgin submitted numerous affidavits and excerpts from depositions, including the affidavits of Human Resources Manager Sharon McGill,

Casino Manager Michael Graninger, and Shift Manager Julian Thompson. These affidavits support Elgin's assertions that hiring decisions are made through three levels and by various individuals at each level: first, Human Resources, then Graninger, then Thompson or another shift manager responsible for auditioning applicants. At the Human Resources level, three managers have been responsible for initial applicant screening during the class period. Human Resources uses some standardized procedures, such as reviewing each application for overall completeness and job history, including previous employment with Grand Victoria. In addition, each Human Resources manager focused on particular factors which she deemed important: Lennor Penson focused on verifying prior employment and eligibility for rehire, while Zaara Norten focuses on job stability. Although McGill oversees the hiring of all new employees, she gives assistant managers full authority to make screening decisions.

Following initial screening, Casino Manager Michael Graninger and Pit Manager Julian Thompson similarly consider both objective and subjective factors while screening applications. Graninger's affidavit explains that he generally reviews applications for such objective considerations as which applicants have two to three years of experience, which applicants have a stable job history, and which applicants have previously worked for Grand Victoria and the reasons they left the casino's employ. According to Thompson, he and Graninger frequently reviewed the applications together, and if the applicant noted that a friend or relative worked at the casino, they often spoke with the friend or relative to verify subjective considerations including the applicant's

skill, work ethic and trustworthiness.

Following this second level of screening, Graninger instructed shift managers or pit managers to invite a group of applicants to audition. At least seven individuals conducted auditions over the course of the class period, objectively testing the applicants' knowledge of the game, procedures, and payoffs for which they auditioned, as well as the applicant's neatness and accuracy in shuffling. However, auditioners also considered inherently subjective factors: the applicant's awareness of all players and occurrences at the gaming table and, particularly, the applicant's ability to interact well with others. Each auditioner's assessment of an applicant necessarily varied with these subjective considerations.

Ellis does not contradict Elgin's assertion that it uses decentralized hiring procedures, and considers objective and subjective factors. Instead, the named plaintiffs assert that their allegation that Elgin engaged in a pattern or practice of discrimination is sufficient to establish commonality. Ellis' main argument is that Elgin knew applicants' race and that many of its hiring procedures constituted a standardized policy of discrimination: 1) Human Resources used a Pre-Employment Screening Tool for those applicants who chose to apply in person; 2) Graninger and other decisionmakers inquired about applicants' skill; 3) Elgin provided an incentive program for employees to refer friends and relatives for dealer positions and offered a training program for current employees; 4) Elgin hired dealers from Hollywood Casino; and 5) Graninger restricts the applicant pool by changing the advertised hiring criteria based on his needs. However, these procedures are facially neutral and Ellis provides no anecdotal evidence to support an

inference that the practices are part of a standardized pattern or practice of discriminatory hiring. Ellis also alleges that Elgin prefers Asian dealers because, after Mr. Thompson auditioned two Vietnamese women in Davenport, Iowa, Elgin advertised for dealers in the Iowa newspapers. Consequently, Elgin hired many Asians. However, the alleged "Asian preference" does not, standing alone or in connection with the aforementioned procedures, form the basis of a pattern or practice of discrimination.

Similarly, Ellis provides no significant statistical evidence that would justify an inference that a pattern or practice exists to unite plaintiffs' claims with those of the class. *See Stastny,* 628 F. 2d at 278 (noting that where putative class members were widely dispersed and worked in different facilities, statistical evidence of "comparable disparities in treatment" by the different facilities would have helped to justify an inference that it reflected a system-wide policy or practice, thereby establishing commonality); *Bishop v. N.Y. City Dept. of Hous. Pres. & Dev.,* 141 F.R.D. 229, 237 (S.D.N.Y. 1992) (finding that plaintiff's statistics supported their commonality claim). First, Ellis offers no statistical evidence to justify an inference that Elgin's advertisement in Davenport, Iowa newspapers was part of a pattern or practice of discriminatory hiring. For example, among other statistically important information, Ellis fails to mention the racial composition of Davenport, fails to mention whether any African American dealers from Davenport applied and were granted or denied an audition or a dealer position, and fails to mention how many Asians from Davenport (or Chicago) applied and were granted or denied an audition or dealer position.

Second, Ellis offers a portion of McGill's deposition to establish that between 2000 and 2002, forty-five individuals where hired through the Bring-a-Friend program, and that a number of the referrals and hires were of the same race (e.g. Asian-Asian, Caucasian-Caucasian). However, while this might establish that persons of one race tended to refer individuals of the same race (a doubtful conclusion at best), it fails to establish that the mere existence of a referral program is part of a pattern or practice of discrimination. The Bring-A-Friend program was open to all Grand Victoria employees, and the fact that employees of one race took advantage of the program, and perhaps tended to refer persons of the same race more than others, cannot be attributed to any intent to discriminate on the part of Elgin.

Third, Ellis' reliance on statistics to establish that the In-House Dealer Training Program is a part of the pattern or practice of discrimination is similarly flawed. Ellis argues, without citing any portion of the record, that employees can only gain admission to the program upon referral by their managers.[15] Accepting Ellis' allegation as true, a requirement that individual managers refer employees is evidence of decentralized

---

15. Elgin disputes this allegation, claiming that employees can sign up for the training program as long as a) the employee has been employed at Grand Victoria for three months and b) does not have too many disciplinary infractions. (Gilmore Dep. at 18, 23-25.) Employees admitted to the program learn "21," and if hired for "21," may train on all other games. (Gilmore Dep. at 24.)

decisionmaking within Grand Victoria rather than of a pattern or practice of discrimination. Ellis further argues that between 1998 and 2002, of eighty-four employees transferred to dealer positions, only four were African American. However, Ellis fails to provide any information defining how many African American employees sought admission but were refused a referral, or how many successful African American candidates completed the program but were not hired as dealers. Standing alone, those numbers are not statistically useful and do not justify an inference that the training program constitutes part of a pattern or practice of discrimination.

Finally, Ellis offered no direct evidence or admission by Elgin that it engaged in a pattern or practice of discriminatory decisionmaking. Thus, the evidence that Ellis provided neither contradicts the strong suggestion that Elgin's decisionmaking methods are highly decentralized and subjective, nor justifies an inference that Elgin engaged in a pattern or practice of discriminatory hiring despite its lack of a centralized hiring system. Decisions on each applicant were therefore made as a result of a decentralized decision making procedure considering both objective and subjective factors, and while each Plaintiff might have an individual claim of discrimination, the plaintiffs have not established a pattern or practice of discrimination common to the class sufficient to satisfy Rule 23(a)'s commonality requirement.

4. Individualized Proof

Another factor this Court considers in determining whether Plaintiffs satisfy commonality is the diversity or uniformity of the class. *Abram,* 200 F.R.D. at 432. Discrimination based solely on membership in a protected class, "which manifests itself in a different set of facts for each employee is not enough to satisfy the

commonality requirement." Id. (quoting *Harris v. City of Chicago,* No. 96 CV 3406, 1998 WL 59873, at *5 (N.D.Ill. Feb.9, 1998)). Similarly, a lack of uniformity in conditions throughout the class period detracts from finding that the plaintiffs satisfy the commonality requirement. Id. at 430-32.

Judge Gottschall rejected Elgin's reliance on *Patterson v. General Motors Corp.,* 631 F. 2d 476 (7th Cir. 1980), for the proposition that the individualized nature of the proof of each class member's claim defeated commonality, holding instead that the alleged pattern or practice united the named plaintiffs' claims with those of the class members. However, as explained above, the evidence reveals a decentralized and subjective hiring practice, which precludes a finding that Elgin engaged in a pattern or practice of discrimination. Although the fact that Elgin used a decentralized hiring system is not new to this litigation, Plaintiffs bear the burden of establishing that, despite the decentralized hiring system, Elgin engaged in a pattern or practice of discrimination. Plaintiffs fail to do so, and absent such a showing, the evidence does not yield any additional uniting question of law or fact to satisfy the commonality requirement. Plaintiffs offer no alternative common question, nor do the affidavits or depositions yield an alternative. To the contrary, the evidence establishes that the applicants had varying levels of experience with various games, and that the applicants applied at different times over the course of the class period, during which the casino's hiring needs fluctuated greatly. For example, the casino needed many more dealers in June and August 1999 when it instituted dockside gambling and changed its shift schedules, while in January 2001 and in August

2002 the casino laid off a number of dealers.

Elgin also contends that because the plaintiffs seek back pay damages, requiring the court to inquire into each "person's employment history, subsequent earnings and efforts to mitigate" precludes a finding of commonality. (Defs.' Mem. at 17.) However, despite the individualized nature of such an inquiry, damage awards commonly vary among class members. *See, e.g. De La Fuente v. Stokely-Van Camp, Inc.*, 713 F. 2d 225, 233 (7th Cir. 1983). Courts commonly bifurcate "employment discrimination trials into liability and damages proceedings." Newberg, supra at §24:24.

The plaintiffs rely on *Mejdrech v. Met-Coil Systems Corp.*, 319 F.3d 910 (7th Cir. 2003), to argue that an individualized inquiry into the applicants' qualifications and the different conditions throughout the class period will not defeat commonality in a pattern or practice discrimination case. However, in Mejdrech the court addressed a mass tort case rather than a Title VII case, and held that the common questions of whether the defendant leaked TCE, and if so, whether that TCE had reached the soil and ground water under the class members' homes united the claims of the named plaintiffs and class members. Id. at 911. The individual inquiries required to resolve the defendant's liability to each class member were minor, with the only variables being the location of each plaintiff's home and water source. Id. at 911-12. Conversely, in the case at bar the court must consider numerous variables to resolve each class member's claim thus defeating the essential purpose and benefits of proceeding as a class.

Moreover, although Plaintiffs correctly state that a pattern or practice discrimination case inherently involves class discrimination, their argument fails to acknowledge the Supreme Court's admonishment that even Title VII claimants must satisfy each element of Rule 23(a) before proceeding or continuing as a class action. *See Falcon,* 457 U.S. at 156-57. Therefore, because Elgin's hiring procedures are decentralized and allow decisionmakers to proceed autonomously, and to consider both objective and subjective factors in screening and auditioning applicants, the plaintiffs have not established that Elgin engaged in a pattern or practice of discrimination sufficient to bridge the gap between their claims and those of the class. Further, the plaintiffs fail to offer any additional evidence to suggest an alternative common question of law or fact and therefore cannot satisfy the commonality requirement of Rule 23(a). Absent any central, objective decisionmaking, and absent any anecdotal or statistical evidence to justify an inference that despite facially neutral procedures Elgin engaged in a standardized, discriminatory course of conduct, the plaintiffs have not demonstrated that a common question of law or fact exists to unite their claims with those of the entire class.

D. Typicality

Likewise, Plaintiffs have failed to establish that the claims of the class representatives are typical of the claims or defenses of the class. See Fed.R.Civ.P. 23(a)(3). The inquiry into whether Ellis' "claims are typical of those of the class members [they represent] is closely related to the commonality inquiry." *See Keele,* 149 F.3d at 595 (citing *Rosario,* 963 F. 2d at 1018). As the *Stambaugh* court explained:

> For their claims to be typical, the plaintiffs [in a pattern and practice discrimination class action] must show an aggrieved class to exist. For their claims to be typical, the plaintiffs must show the same unlawful conduct was directed at or affected the class. For their claims to be typical, the plaintiffs must present some evidence from which to infer that the selection process ... is uniformly administered....

Stambaugh, 151 F.R.D. at 677. Thus, "[a] 'plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.' " Keele, 149 F.3d at 595 (quoting *De La Fuente v. Stokely-Van Camp,* 713 F. 2d at 232). Although factual variations in claims will not destroy typicality, even those claims "based on the same legal theory, must all contain a common 'core of allegation.' " *Allen,* 828 F.Supp. at 553 (quoting *Riordan,* 113 F.R.D. at 63). In other words, the named representatives' claims must "have the same essential characteristics as the claims of the class at large." Retired Chi. Police Ass'n I, 7 F.3d at 597.

This Court determines whether typicality is satisfied "with reference to [Elgin]'s actions, not with respect to particularized defenses it might have against certain class members." *See Wagner v. NutraSweet Co.,* 95 F.3d 527, 534 (7th Cir. 1996) (citing *Rosario,* 963 F. 2d at 1018). However, a unique defense will destroy typicality if it will "consume the merits of the case." *Gaspar,* 167 F.R.D. at 57 (citing *Riordan,* 113 F.R.D. at 62). Those unique defenses consuming the merits destroy typicality

because they eliminate a primary purpose of a class action: to allow the named plaintiffs to "establish the bulk of the elements of each class member's claims when they prove their own." *Retired Chicago Police Ass'n v. City of Chicago,* 141 F.R.D. 477, 485 (N.D.Ill. 1992) (citing *Brooks v. S. Bell Tel. & Tel. Co.,* 133 F.R.D. 54, 58 (S.D.Fla. 1990)), *aff'd in pertinent part, rev'd in part, Retired Police Ass'n I,* 7 F.3d at 597-98.

Ellis contends that Judge Gottschall "unconditionally and unequivocally concluded" that the named plaintiffs satisfied Rule 23(a)'s typicality requirement. However, as explained previously, every aspect of a court's certification order is necessarily conditional because of the court's obligation to modify or decertify the class if the course of litigation reveals that certification is no longer proper. *Falcon,* 457 U.S. at 160; *Binion,* 163 F.R.D. at 520.

Elgin argues plaintiffs' claims are atypical of the class members' claims, because 1) two named plaintiffs were auditioned and two were not; 2) each applicant had unique qualifications; and 3) two named plaintiffs are subject to unique defenses not applicable to other class members. Elgin also argues that when class representatives Ellis and Denson filed an additional lawsuit against Elgin,[16] alleging that Elgin retaliated against them for the instant action by prohibiting their

---

16. *Denson & Ellis v. Elgin Riverboat Resort, Nevada Landing Partnership & RBG, L.P.,* Case No. 03 C 3402, filed on May 21, 2003, in the Northern District of Illinois.

entry to the Grand Victoria Casino during *429 the pendency of this litigation and for 120 days following its conclusion, they further eroded typicality between their claims and those of the class members. (Defs.' Supp'l Submission in Support of Mot. to Decertify.)

Although Ellis relies on a single legal theory (the alleged pattern and practice of discriminatory hiring), as explained above in the discussion of Rule 23's commonality requirement, Ellis has failed to establish a standard operating procedure rising to the level of a pattern or practice of discriminatory hiring, and likewise fails to establish a common core of allegation to satisfy the typicality requirement. Plaintiffs offer no additional evidence, either anecdotal or statistical, to establish that their claims are typical of those of the class. Nor do Plaintiffs dispute that, beyond the alleged pattern and practice of discrimination, the circumstances of each applicant are unique and require consideration of numerous individualized factors. For example, individual class members would have to establish their qualifications for a dealer position, the circumstances of their application and, where appropriate, their audition. Such proof would require an inquiry into how far the class member's application proceeded, as well as which employees reviewed the application. For those applicants who auditioned, a further individualized inquiry would entail consideration of which shift manager or pit manager conducted the audition. Finally, proof of auditioning class members' claims would require consideration of the manager's objective assessment of the applicant's neatness and accuracy, and knowledge of the game, procedures and payoffs, as well as his or her subjective assessment of the applicant's awareness of

players at the gaming table and ability to interact with customers. Absent a common core of allegation, such individualized inquiries defeat the purpose of a class action.

Finally, Ellis does not dispute the defenses unique to Ellis and English: Ellis was previously employed by the casino and did not receive an invitation to audition, while English sought part-time employment and was a frequent customer at Grand Victoria. Such unique defenses render their claims atypical of those of the rest of the class. *Cf. J.H. Cohn & Co. v. Am. Appraisal Assocs., Inc.*, 628 F. 2d 994, 998-99 (7th Cir. 1980) (noting that an "arguable defense peculiar to the named plaintiff ... may destroy the required typicality of the class"); *Bishop,* 141 F.R.D. at 239 (finding a named plaintiff atypical where the defendants would likely raise a defense unique to that plaintiff). Therefore, because proof of each class members' claim would require a fact-intensive, individualized inquiry into the circumstances surrounding the decision not to audition or to hire that applicant, and because Defendants will raise defenses unique to two named plaintiffs, this Court finds that the named Plaintiffs' claims are not typical of those of the class. The Court agrees with Defendants that the named plaintiffs and class members have instead only identified "idiosyncratic circumstances of his or her own application and its rejection by Grand Victoria." (Defs.' Mem. at 12.)

1. Adequacy of Representation

Finally, Rule 23(a) requires Plaintiffs to demonstrate that they adequately represent the interests of the class as a whole. Fed.R.Civ.P. 23(a)(4). In order to satisfy this requirement, Ellis must establish both 1) the adequacy of named plaintiffs' counsel, and 2) the adequacy of the

named plaintiffs' representation in " class members." *Retired Police Ass'n I,* 7 F.3d at 598 (quoting *Sec'y of Labor v. Fitzsimmons,* 805 F. 2d 682, 697 (7th Cir. 1986)). Thus, just as the inquiry into commonality and typicality are linked, so too are the inquiries into typicality and adequacy of representation, because "[t]ypicality insures the class representative's claims resemble the class's claims to an extent that an adequate representation can be expected." *Stambaugh,* 151 F.R.D. at 676 (citing 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1764 at 232-33 (2d ed. 1986)). If the representative and the class members have "antagonistic or conflicting claims," the "class is not fairly and adequately represented." Id. (quoting *Rosario,* 963 F. 2d at 1018); but see *Orlowski v. Dominick's Finer Foods, Inc.,* 172 F.R.D. 370, 374 (N.D.Ill. 1997) (holding that, despite the defendant's argument that class members competed for a limited number of promotion opportunities, the named plaintiffs would adequately represent the class). Further, just as the presence of an arguably unique defense may destroy typicality, so too can "the presence of even an arguable defense against the named plaintiff that is not applicable to the proposed class ... can vitiate the adequacy of named plaintiff's representation." *Hardin v. Harshbarger,* 814 F.Supp. 703, 708 (N.D.Ill. 1993).

Plaintiffs again rely on the unconditional nature of Judge Gottschall's certification with respect to their adequacy of representation. However, as explained previously, every aspect of a court's certification order is necessarily conditional because of the court's obligation to modify or decertify the class if the course of litigation reveals that certification is no longer proper. *Binion,* 163

F.R.D. at 520. Given the five-year class period, class members very likely competed against each other for dealer positions at the casino, presenting antagonistic and conflicting claims within the class. Additionally, as previously explained, Elgin offers defenses unique to Ellis and English. These unique defenses will distract Ellis and English from adequately representing the interests of the class. This distraction, combined with Plaintiffs' and class members' unique qualifications and the casino's varied hiring needs at the time of each class member applied, make it unlikely that Plaintiffs will be able to adequately represent the class as a whole. Therefore this Court finds that Plaintiffs also fail to satisfy Rule 23(a)(4)'s requirement that Plaintiffs will adequately represent the class.

E. Certification Under Rule 23(b)(2)

Elgin also contends that Judge Gottschall improperly certified the class under Rule 23(b)(2) because Plaintiffs and class members seek monetary damages, relying on the Seventh Circuit's holding that, where money damages are incidental, certification under Rule 23(b)(2) is improper. *Lemon v. Int'l Union of Operating Eng'rs, Local No. 139,* 216 F.3d 577, 579 (7th Cir. 2000). However, in Lemon the court discussed the certification options presented when plaintiffs seek declaratory and injunctive relief as well as monetary damages, relying on its recent decision in *Jefferson v. Ingersoll Int'l, Inc.,* 195 F.3d 894 (7th Cir. 1999). The Seventh Circuit held that a court may certify such a case in one of three ways, including certifying the class under Rule 23(b)(2) while "exercis[ing] its plenary authority under Rules 23(d)(2) and 23(d)(5) to provide all class members with personal notice and opportunity to opt out, as though the class was certified under Rule 23(b)(3)." *Lemon,* 216

F.3d at 582 (citing *Jefferson,* 195 F.3d at 898). However, because this Court finds that Plaintiffs fail to establish Rule 23(a)'s requirements to maintain a class action, we do not need to reach the issue of whether the requirements of Rule 23(b)(2) are met.

IV. Conclusion

For the foregoing reasons, and because Plaintiffs have not demonstrated that a common question of law or fact exists, that their claims are typical of those of the class, or that they can adequately represent the class, this Court grants Defendants' motion to decertify the class. Defendants' motion to amend the class definition to include only those applicants who auditioned is denied as moot.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 98 C 7093

[title omitted in printing]

MEMORANDUM OPINION AND ORDER

Plaintiffs Lisa Ellis and Marcia English filed a one-count employment discrimination complaint against Defendant, Elgin Riverboat Resort d/b/a Grand Victoria Riverboat; Nevada Landing Partnership and RBG, Ltd. (collectively, "Elgin"), alleging unlawful failure-to-hire under the Civil Rights Act of 1964, 42 U.S.C. §2000(e) (Title VII).[1] Elgin moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.[2] Plaintiffs did not respond to Elgin's motion nor did they controvert Elgin's Local Rule 56.1 Statement of Undisputed Material Facts. In accordance with Local Rule 56.1(b)(3)(B), this Court deems all material facts set forth in Elgin's Statement of Undisputed Material

---

1. Plaintiffs' amended complaint originally included Yvonne Mason and Derrick Denson as plaintiffs. Mason and Denson have since resolved their disputes with Elgin and they are no longer parties to this suit.

2. The parties have consented to have this Court conduct any and all proceedings in this case, including the entry of final judgment. See 28 U.S.C. §636(c); Local R. 73.1(a).

Facts admitted by Ellis and English. For the following reasons, Elgin's motion is granted.

I. Background

Elgin is a state-licensed gambling facility located in Elgin, Illinois, Elgin has approximately 1600 employees, of whom slightly under 400 are dealers. Elgin utilizes a standard employment application form for the dealer position. The application includes questions about the positions sought, shift preferred, educational background, prior employment, and questions bearing upon licensing criteria established by the Illinois Gaming Board. Nowhere on the application is there any reference to the race of the applicant. Completed applications are initially received and processed by one of Elgin's human resources clerks. After processing the application, the clerk forwards it to an assistant human resources manager, who performs the initial screening function.

During the period relevant to Plaintiffs' claims, Lennor Penson, an African-American, was the assistant human resources manager and conducted the initial screen. In conducting the initial screen, Penson would: determine if the application was complete; verify whether the applicant had any gaming experience; verify whether the applicant had worked for Elgin before (and, if so, why he left); and review the applicant's work history. Penson had fill and final authority to reject an applicant based upon the results of her initial screen. During the period relevant to this lawsuit, Elgin threw out rejected applications after thirty days.

Applications that survive the initial screen are held until the casino manager, or someone from his staff, indicates that there are openings for dealers, at which point the applications are sent to the casino manager for

further screening. Further screening generally consists of a very brief review of each candidate's casino experience and job stability. Candidates whose applications survive the casino manager's screen are scheduled for an audition with Elgin's Pit Department. The auditions are held in Elgin's pavilion, a land-based structure through which patrons reach the riverboat casino when it is docked. The auditioning applicants are evaluated on: (1) knowledge of the game procedures and bet pay-offs; (2) proficiency and dexterity in dealing; (3) awareness of the game environment, including possible gaming irregularities; and (4) ability to relate to the customer and maintain a friendly and personable demeanor. The person conducting the audition determines who has passed and, at the time period relevant to the Plaintiffs' claims, had the final say on who would be given an offer of employment as a dealer. Applicants who pass the audition are offered employment contingent upon passing a drug test and criminal background check.

In August 1998, Lisa Ellis was seeking employment as a dealer with Elgin. Ellis had experience as a dealer but a turbulent work history. Ellis worked as a dealer for Elgin from October 1994 until March 1995. Before quitting that job for health reasons, Ellis received several weeks of dealer training. Ellis was rehired by Elgin on December 5, 1995, but she terminated her employment about a week later due to scheduling issues. From May 29, 1996, until September 3, 1996, Ellis worked for Majestic Star Casino in Gary, Indiana While the events leading up to her departure are in doubt, as of September 3, 1996, Ellis was not eligible for rehire with Majestic Star. After Majestic Star, Ellis worked at Empress Casino in Hammond, Indiana from December 12, 1996,

until June 14, 1997. Empress Casino's records suggest Ellis had attendance problems when she worked there. Ellis was hired by Hollywood Casino on September 8, 1997, but she terminated her employment on September 10, 1997, because of scheduling issues. After September 10, 1997, Ellis was not eligible for rehire with Hollywood Casino. Finally, in June 1998, Ellis was employed by Trump Casino in Gary, Indiana, where she worked for approximately one month before resigning.

In August 1998, Marcia English was also seeking work as a dealer for Elgin. English worked as a full-time school teacher since September 1972 but had experience as a casino dealer as well. From May 1996 until November 1998, English worked as a dealer for Majestic Star Casino in Gary, Indiana.

While both Ellis and English submitted applications to Elgin, only English was invited to audition on August 12, 1998. In fact, on August 10, 1998, Ellis learned that her application had been rejected. Ellis claims that, despite the formal rejection, Elgin Pit Boss Kevin Schmieder encouraged her to attend the August 12 audition because the casino needed dealers. (Ellis Dep., 10/4/02, at 326-28.) So, on August 12, 1998, Ellis, English and English's friend, Yvonne Mason, went to Elgin to audition for jobs as dealers. Elgin permitted all three women to audition but told Ellis and Mason that they would audition last because they were the only candidates not on the schedule and that they would need to submit new application forms before Elgin would consider them for employment.

Ellis and English state that there were six other candidates auditioning for dealer positions on August 12,

1998. There are no records of who auditioned that day and the identities of the other candidates remain unknown. According to Ellis and English, the other candidates included one Asian woman, four Caucasian women and one Caucasian man, (Id. at 338-39.) Ellis and English claim that all of the Caucasian candidates auditioned together for about forty-five minutes while the rest waited in a separate room. (Id. at 343-44.) Ellis and English do not know what transpired during the auditions. (Id. at 342-44.) After the first group was finished, Ellis, English, Mason and the Asian woman began their audition. Ellis and English claim that their audition was cut short when the persons conducting the audition indicated that they needed to leave early in order to be on the casino boat before it left the dock. (Id, at 350-53.) The Plaintiffs do not recall if the boat actually left the dock following their auditions. Elgin acknowledges that the Plaintiffs' audition may have been rushed because in 1998 dockside gambling was not permitted so the casino was required to leave the dock before gambling could begin, (Grainger Aff. 18.)

After the auditions, Ellis, English and Mason went to the Human Resources Department so that Ellis and Mason could submit dealer application forms. Ellis and English claim that they encountered the Caucasian candidates in the Human Resources Department and that the Caucasians were holding drug test forms. (Ellis Dep., 10/4/02, at 357-58, 376-77.) The fact that all of the Caucasians were in possession of these forms indicated to the Plaintiffs that the Caucasians had all been offered jobs after their audition. (Id. at 358.) A few days later, Ellis and English were informed by mail that their applications had been rejected.

Plaintiffs filed suit against Elgin for employment discrimination in November 1998 and amended that complaint in July 1999. Plaintiffs originally brought this suit as a class action. After receiving class certification, however, Plaintiffs' investigation and discovery efforts failed to produce sufficient evidence of a pattern or practice of racially discriminatory hiring as a standard operating procedure at Elgin and on August 22, 2003, this Court decertified Plaintiffs' class action.[3] Now before the Court is Elgin's motion for summary judgment. Plaintiffs have not responded to Elgin's motion nor have they controverted Elgin's Local Rule 56.1 Statement of Undisputed Material Facts. In accordance with Local Rule 56.1(b)(3)(B), "[a]ll material facts set forth in the statement required of the moving party [Elgin] will be deemed to be admitted unless controverted by the statement of the opposing party."

Summary judgment is appropriate when the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); i*Sinkler v. Midwest Prop. Mgmt., Ltd.,* 209 F.3d 678, 683 (7th Cir. 2000). In determining whether summary judgment is appropriate, the Court must view the evidence, and draw all reasonable inferences therefrom, in the light most favorable to the nonmoving party. *See Anderson v.*

---

3. *Ellis v. Elgin Riverboard Resort,* 217 F.R.D. 415 (N.D. Ill. 2003).

Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); *Kennedy v. United States,* 965 F.2d 413, 417 (7th Cir. 1992). However, if the nonmovant bears the burden of proof on an issue he or she may not simply rest on the pleadings, but rather must affirmatively set forth specific facts establishing the existence of a genuine issue of material fact. *See Celotex,* 477 U.S. at 322-26.

Summary judgment is appropriate when the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322. If taking the record in its entirety cannot lead a rational trier of fact to find for the nonmoving party, then there is no genuine issue for trial and summary judgment must be granted. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).

Ellis and English allege in their complaint that, in violation of Title VII, Elgin refused to hire them because they are African-Americans. Title VII makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin .. , ." 42 U.S.C. §2000e-2(a)(1). A plaintiff alleging employment discrimination under Title VII may either present direct evidence of discrimination or proceed under *McDonnell Douglas's* burden-shifting formula. Under the direct method, Ellis and England must present enough direct or circumstantial evidence of discriminatory motivation to create a genuine issue for trial. *Radue v. Kimberly-Clark Corp.,* 219 F.3d 612, 616 (7th 2000). "Direct evidence essentially requires an admission by the

decision-maker that his actions were based on the prohibited animus." Id. Where there is no direct evidence of discrimination, the plaintiff may proceed under the indirect burden-shifting formula established by *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). The burden-shifting formula allows Ellis and English to establish a prima facie case of race discrimination when they show: (1) that they belong to a racial minority; (2) that they applied and were qualified for a job for which Elgin was seeking applicants; (3) that, despite their qualifications they were rejected; and (4) the position was given to someone of a different race who had similar or lesser qualifications. *Malacara v. City of Madison,* 224 F.3d 727, 729 (7th Cir. 2000). If Ellis and English succeed in establishing a prima facie case, the burden of production shifts to Elgin to articulate a legitimate, nondiscriminatory reason for its action. Id. If Elgin satisfies its burden of production, Ellis and English must then establish that Elgin's nondiscriminatory explanations are mere pretext for discrimination. To do this, Ellis and English must show that either (1) it is more likely that a discriminatory reason motivated Elgin than the proffered nondiscriminatory reason or (2) that Elgin's explanation is not credible. *Hudson v. Chicago Transit Auth.,* 375 F.3d 552, 561 (7th Cir. 2004). "Pretext is more than a mistake on the part of the employer; it is a phony excuse." Id. Courts look to whether the employer gave an honest explanation for its behavior and are not "super-personnel departments" that reexamine an entity's business decisions. Id. Finally, though the burden of production shifts, the burden of persuasion remains on Plaintiffs Ellis and English at all times. *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 143 (2000).

II. Discussion

Neither Ellis nor English produce any direct evidence of discrimination against either of them so there can be no prima facie case of employment discrimination under the direct method. *Radue,* 219 F.3d at 616. Because they have no direct evidence, the Plaintiffs must show the four elements of *McDonnell Douglas's* indirect, burden-shifting method to establish their prima facie case of employment discrimination. Elements (1) and (3) of the burden-shifting formula are not in dispute as all parties agree that both Plaintiffs belong to a racial minority and that neither was hired for the dealer job. Elgin argues that neither Ellis not English can establish element (2), that they were qualified for a job Elgin was seeking to fill, nor element (4), that the position was given to someone of a different race who had similar or lesser qualifications.

A. Element (2)

In their complaint, Ellis and English claim that they were qualified for the jobs for which they applied and that at all times relevant each was well-trained, competent and experienced as a riverboat casino dealer. Elgin does not deny that Ellis and English both had relevant training and work experience.

1. Ellis

Elgin argues that Ellis was not qualified to work as a dealer in August 1998 because she was a former employee of the casino and because she had a poor work history. Ellis worked as a dealer for Elgin from October 1994 to March 1995. Elgin rehired Ellis in December 1995 but she left the job a few days later without giving proper notice. After leaving Elgin in 1995, Ellis worked for four different casinos in the next three years. Ellis did not hold any of the four casino jobs for more than

six months and in August 1998 she was not eligible to be rehired at two of them.

A plaintiff's work history is relevant to her employment discrimination claim. In *Lee v. Nat'l Can Corp.*, the Seventh Circuit chastised a district court for glossing over a plaintiff s extended periods of unemployment, short-term jobs, and numerous firings, and suggested that a poor work history alone could be grounds for finding a plaintiff unqualified for a job. 699 F.2d 932, 936-37 (7th Cir. 1983). The Seventh Circuit explained that:

> "Title VII does not compel employers to hire unqualified applicants with questionable employment histories. The Supreme Court described the policy underpinnings of Title VII in McDonnell Douglas Corp. v. Green, noting that'[t]he broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions."'

Id. at 937. Furthermore, in the refusal to rehire context, the Seventh Circuit recognizes that businesses must adjust to changes in the marketplace and "[t]he fact that an individual may have been qualified in the past does not mean that he is qualified at a later time." *Grohs v. Gold Bond Bldg. Prods.*, 859 F.2d 1283,1287 (7th Cir. 1988).

As a general rule Elgin does not rehire dealers except where the dealer had a good excuse for leaving or when Elgin is desperate for dealers. (Grainger Dep. at 84-85.) Elgin also gives fiill weight to an applicant's work

history and rejects applicants who cannot show a history of steady and satisfactory work, although exceptions are made when Elgin is desperate for dealers. (Id. at 91-92; Penson Dep. at 14.) Because of her poor work history in general and with Elgin in particular, Elgin claims that it would not rehire Ellis.

As noted, a poor work history does not always mean an applicant is unqualified to be an Elgin dealer. Unlike some of its hiring criteria (e.g., a successful audition), Elgin applies its no rehire rule and its job history rule less stringently when there is an extreme need for dealers. (Grainger Dep. at 84-85, 91-92.) In August 1998, Elgin may have had an extreme need for dealers. Ellis contends that on August 11, 1998, Pit Boss Kevin Schmieder encouraged her to attended the August 12, 1998, audition precisely because Elgin needed dealers. (Ellis Dep., 10/4/02, at 326-28.) Furthermore, despite her unscheduled arrival, Elgin auditioned Ellis on August 12, 1998. (Id. at 332.) The conversation with Pit Boss Schmieder and the audition are significant because normally it is Elgin's Pit Department that conducts the auditions and makes the final hiring decisions. (Grainger Aff. 16.) In Ellis's case, however, it appears that the August 12, 1998, audition was the first step in applying for a job, not the usual last step. Ellis admits that Schmieder may not have seen her application or known anything about her work history when he encouraged her to audition. (Ellis Dep., 10/4/02, at 328.) Ellis admits that after her audition she and Yvonne Mason (who had not yet applied to work for Elgin) were required to submit new application forms to Elgin's Human Resources Department. (Id. at 332.) Ellis does not deny that her new application would be reviewed by Elgin's Human

Resources Department and by Elgin's casino manager. According to the hiring criteria described by Elgin's Human Resources Department and casino manager, Ellis was not eligible for rehire. (Grainger Dep. at 48, 84-85; Penson Dep, at 29.) Finally, even if its hiring standards were more flexible in August 1998, Elgin had rejected Ellis as recently as August 10, 1998, just two days before her audition. (Ellis Dep., 10/4/02, at 316-17.) When viewed in a light most favorable to the nonmovant, it is not reasonable to infer that Elgin's flexibility with regard to work histories applied to Ellis's application in August 1998. Accordingly, Ellis cannot show that she was qualified for Elgin's dealer position and cannot establish the second element of her prima facie case.

2. English

Elgin argues that English was not qualified to work as a dealer in August 1998 because she was a frequent player at the casino and because she was seeking part-time work. As a general rule, it Elgin does not hire its frequent players as dealers because they may have relationships with other patrons that will create conflicts of interest. And in August 1998 Elgin was not looking to hire any part-time employees so the job English sought did not exist. English admits that she gambled at i Elgin's casino on as many as thirty occasions and had an Elgin card which could be used toward "comps" on other items. (English Dep., 8/18/99, at 77-78, 81-82.) English is also a full-time ' school teacher and cannot work any shift at a casino between the hours of 8:30 a.m. to 2:30 p.m. el ~i

While English's status as a frequent player and full-time teacher undermines her employment discrimination claim, English's prima facie case simply vanishes as she

admits that she is unaware of Elgin's hiring criteria in August 1998. (English Dep., 10/15/02, at 245-47.) In *Bennett v. Roberts,* an African-American teacher claiming race discrimination in a failure-to-hire case could not establish a prima facie case of employment discrimination because she could not establish that she was qualified for the positions she sought. 295 F.3d 687, 696 (7th Cir. 2002). Though the African-American plaintiff had very strong teaching credentials, the Seventh Circuit found that "comparisons [to the white teachers who were hired] are meaningless absent some information concerning the hiring criteria for these positions." Id. As in *Bennett,* English simply has no basis for arguing that she was qualified to be a dealer for Elgin in August 1998 and she cannot establish the second prong of the *McDonnell Douglas* burden-shifting formula. Neither Plaintiff can establish

B. Element (4)

Neither Plaintiff can establish the fourth prong of the burden-shifting formula because the identities of the Caucasian applicants are unknown. Element (4) of the burden-shifting formula requires that the position sought by the plaintiff was given to someone of a different race who had similar or lesser qualifications. Plaintiffs cannot show that the Caucasian applicants actually received jobs nor that the Caucasian applicants had similar or lesser qualifications.

Although neither the Plaintiffs nor the Defendant have any information about the Caucasian candidates, the Plaintiffs claim that the Caucasians were offered jobs on August 12, 1998. Ellis and English stated that, following the August 12 auditions, the Caucasian applicants in the Human Resources Department were holding drug test

forms. (Ellis Dep., 10/4/02, at 357-58.) Because neither Plaintiff produces any evidence of the drug test forms nor any other evidence supporting their claim that the Caucasians actually received jobs, they fail to present a genuine issue of material fact.

The Plaintiffs have no information on the qualifications of the Caucasian applicants. (Id. at 311, 376-77.) The Plaintiffs do not know the identities of the Caucasian applicants. (Id. at 376-77.) The Plaintiffs were not in the room when the Caucasians auditioned and have no basis for commenting on the Caucasians' performances. (Id. 342-44.) Unable to compare themselves to the Caucasian candidates, Ellis and English can only rely on speculation and assume that they were as qualified as anyone for the dealer jobs. This kind of speculation cannot create an issue of material fact. *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1181 (7th Cir. 2002) (holding that, "plaintiffs contention that he is the better candidate for a vacancy constitutes nothing but the employee's own opinion at least a logical reason to believe the employer would not have taken the same action if the employee was not a member of a protected minority group and everything else remained the same. *See Kelley v. Apollo Travel Servs. P'ship*, 2000 WL 1170074, at *9 (N.D. Ill. Aug. 16, 2000). Ellis and English simply do not have any evidence as to any wrongdoing. Where there is no evidence that the best candidate did not receive the job, a court will not assume wrongful conduct by the employer. Accordingly, Ellis and English fail to establish the fourth element of their prima facie claim of employment discrimination.

In the Seventh Circuit, "the prima facie case under McDonnell Douglas must be established and not merely

incanted." *Coco v, Elmwood Care, Inc.*, 128 F.3d 1177, 1178 (7th Cir. 1997). The Court finds that, after drawing all reasonable inferences in their favor, neither Ellis nor English presents sufficient evidence to create a genuine issue of material fact with regard to their prima facie case of employment discrimination. Because the plaintiffs cannot establish a prima facie case summary jdugment in favor of Elgin is appropriate.

III. Conclusion

For the foregoing reasons, Elgin's motion for summary judgment is granted and this case is dismissed.

ENTER ORDER:

/s/ Martin C. Ashman
United States Magistrate Judge

Dated: September 21, 2004

Supreme Court, U.S.
FILED
MAY 26 2005
OFFICE OF THE CLERK

No. 04-1447

In the Supreme Court of the United States

TAMELA Q. SIMMONS,

Petitioner,

v.

NEVADA LANDING PARTNERSHIP, ELGIN RIVERBOAT RESORT, d/b/a GRAND VICTORIA RIVERBOAT and RBG LIMITED PARTNERSHIP,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

JANE M. MCFETRIDGE
Counsel of Record
JOEL W. RICE
FISHER & PHILLIPS LLP
1000 MARQUETTE BUILDING
140 SOUTH DEARBORN STREET
CHICAGO, IL 60603
(312) 346-8061

Counsel for Respondents

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTION PRESENTED

Whether the Seventh Circuit's dismissal of the petitioning – intervenors' appeal as untimely was correctly decided under a straightforward application of the Federal Rules of Appellate Procedure, where the notice of appeal was filed four days after the 30-day appeal period had run, and no request for an extension of time was ever filed by intervenors, notwithstanding the Seventh Circuit's express invitation for them to do so.

PARTIES TO THE PROCEEDING

All parties to the proceeding below are not reflected in the case caption. The other appellants in the Seventh Circuit Court of Appeals were: Dorothy N. Burks, Katrina Dismuke Cureton, Ramona Camprindo, Robert Curtington, Darryl W. Donahue, Donna D. Jackson, Delores Miller, Keith Moody, Evelyn D. Norris, Wellington Okoh, Noelle Olivier, James Reaves, Jennifer Thomas, Tamara Turner, and Lawrence D. Williams.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondents Elgin Riverboat Resort d/b/a Grand Victoria Casino, Nevada Landing Partnership, and RBG, L.P., make the following disclosures:

1. *Identify any parent corporations:*

   Elgin Riverboat Resort is a general partnership that is 50 percent owned by Nevada Landing Partnership and 50 percent owned by RBG, L.P. Nevada Landing Partnership is wholly-owned by MGM/Mirage.

2. *Identify any publicly-held corporation that owns ten percent or more of Respondents' stock:*

   None.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

RULES INVOLVED 1

STATEMENT OF THE CASE 2

A. The District Court Proceedings 2

B. Proceedings Before The Court Of Appeals 6

REASONS FOR DENYING THE WRIT 8

A. The Seventh Circuit's Dismissal Of The Appeal As Untimely Does Not Conflict With This Court's Decision In *United Airlines, Inc. v. McDonald* . . 9

B. The Dismissal Of Simmons' Appeal As Untimely Does Not Raise Any Important Federal Question Requiring Resolution By This Court 13

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

American Pipe & Construction Co. v. Utah,
414 U.S. 538 (1974) 9

Browder v. Director, Department of Corrections of Illinois,
434 U.S. 257 (1978) 10

Roe v. Town of Highland,
909 F.2d 1097 (7th Cir. 1990) 7, 8, 11, 12, 13

United Airlines, Inc. v. McDonald,
432 U.S. 385 (1977) . . . . . *passim*

United States for Use and Benefit of Canion v. Randall & Blake,
817 F.2d 1188 (5th Cir. 1987) 11

STATUTES

28 U.S.C. § 636(c) 3
28 U.S.C. § 1254(1) 1

RULES

Fed. R. App. P. 4(a) 7, 10
Fed. R. App. P. 4(a)(1)(A) 1, 10
Fed. R. App. P. 4(a)(5) 1, 2, 7, 11, 12, 13
Fed. R. App. P. 26(b) 1, 2, 7, 11
Fed. R. Civ. P. 23(a) 4
Fed. R. Civ. P. 23(c)(1) 3
Fed. R. Civ. P. 24(b) 8, 10
Fed. R. Civ. P. 24(c) 1

7th Cir. Rule 53(b)(2)(iv) 13
N.D. Ill. Local Rule 73.1(b) 3

Respondents, Elgin Riverboat Resort d/b/a Grand Victoria Casino, Nevada Landing Partnership and RBG, L.P. (hereinafter collectively "Grand Victoria"), respectfully pray that this Court enter an order denying the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit filed by the Petitioner, Tamela Q. Simmons ("Simmons").

OPINIONS BELOW

The opinions of Judge Gottschall contained in Simmons' Appendix at pages 3-15 are not relevant to the matters sought to be reviewed by this Petition. In addition to the orders and opinions cited by Simmons, the Seventh Circuit's unpublished order dated November 1, 2004 is relevant to the issues raised herein.

JURISDICTION

Grand Victoria concurs that jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

RULES INVOLVED

Grand Victoria disagrees that Rule 24(c) of the Federal Rules of Civil Procedure is relevant to the determination made by the Seventh Circuit Court of Appeals that Simmons' appeal was untimely. In addition to Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure cited by Simmons, Rules 4(a)(5) and 26(b), Fed. R. App. P., are also relevant to the Seventh Circuit's determination.

Rule 4(a)(5), Fed. R. App. P., provides, in pertinent part, as follows:

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

Rule 26(b), Fed. R. App. P., provides, in pertinent part, as follows:

(b) **Extending Time.** For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:

(1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; . . .

STATEMENT OF THE CASE

A. The District Court Proceedings

This Title VII lawsuit was brought in the fall of 1998 by plaintiffs Lisa Ellis, Marcia English, and Yvonne Mason (since deceased), on behalf of themselves and a putative class of African-American applicants for dealer positions, alleging that Grand Victoria discriminated against them on the basis of race in the hiring process. Derrick Denson was later added

as a fourth named plaintiff. App. 21, 54, and 59.[1] Near the incipiency of this case and after a limited discovery period, plaintiffs moved for class certification. Several months later, on March 27, 2000, Judge Gottschall, the district court judge then presiding over this case, certified a class even though plaintiffs had not established the requisite numerosity. App. 2-13. Nevertheless, the District Court found that "plaintiffs have conditionally established numerosity," while noting that "[t]he court has the option under Rule 23(c)(1) of decertifying the class later." App. 9.

On November 5, 2001, Magistrate Judge Ashman presided over a settlement conference. Because it appeared that the parties had reached an agreement in principle as to the overall monetary amount of the class settlement, even though other significant issues remained in controversy, Magistrate Judge Ashman entered an order reflecting settlement, but set the case for further status. Shortly thereafter, pursuant to 28 U.S.C. § 636(c) and Local Rule 73.1(b), and with the parties' unanimous consent, this case was reassigned to Magistrate Judge Ashman for the purpose of conducting any and all proceedings including entry of a final judgment. R. 56 and 57; App. 16 n. 1. Over the course of the ensuing months, it became apparent that the parties did not have a meeting of the minds over many material aspects of the class settlement. Eventually, on March 15, 2002, Magistrate Judge Ashman held a hearing on the parties' competing motions with respect to the purported

---

[1] References to Simmons' Appendix will be abbreviated as "App." followed by the page numbers. References to Simmons' Petition for Writ of Certiorari will be abbreviated as "Pet." followed by the page number. Items in the District Court record will be referred to by their docket entry number and abbreviated as "R. __" followed by the docket entry number.

class settlement. The hearing confirmed that the parties were at loggerheads over numerous issues. R. 102, Transcript of Proceeding, March 15, 2002 ("Tr."). Indeed, class counsel conceded at the March 15 hearing that they did not have their clients' agreement even to the tentative settlement terms discussed back in November 2001. R. 102, Tr. at 16-19. Accordingly, Magistrate Judge Ashman concluded that there was obviously no meeting of the minds and, hence, no agreement. Nevertheless, in an effort to conclusively determine if settlement could be reached, Magistrate Judge Ashman ordered the parties to appear before him for another settlement conference. At the renewed settlement conference that took place on May 29, 2002, the parties were unable to reach an agreement. R. 71.

Based upon substantial additional discovery that took place in the latter half of 2002, Grand Victoria moved to decertify the class. App. 22. On August 21, 2003, Magistrate Judge Ashman granted Grand Victoria's motion in a 33-page opinion. App. 16-53. The District Court found no evidence of a pattern and practice of race discrimination uniting the plaintiffs' claims with those of the class as a whole. In particular, the District Court cited, *inter alia*, Grand Victoria's highly-decentralized hiring process as well as the abundance of individualized proof that would be necessary to resolve each class member's claim as militating against the findings of commonality and typicality required under Rule 23(a), Fed. R. Civ. P. App. 36-50. Put differently, the Court found neither anecdotal nor statistical evidence that race discrimination was a standard operating procedure at Grand Victoria. Plaintiffs' request for interlocutory review of the District Court's decertification ruling was denied by the Seventh Circuit.

Grand Victoria next proceeded to move for summary judgment on the individual claims of the two remaining plaintiffs, Lisa Ellis and Marcia English. The other plaintiffs, Denson and a representative of Ms. Mason's estate, had, in the interim, settled with Grand Victoria. App. 54 n.1. The attorneys for Ellis, English, and the putative class sought and were granted leave to withdraw. R. 107. After considerable delay, plaintiffs Ellis and English eventually located new counsel. Plaintiffs' new counsel, however, was unable to respond to Grand Victoria's motion, which was eventually granted on September 21, 2004. App. 54-68. In granting summary judgment for Grand Victoria, the District Court found that neither Ellis nor English was able to make out a *prima facie* case of race discrimination because they could not show, as a matter of law, that (a) they were qualified for the dealer position, or (b) the position was given to someone of a different race who had similar or lesser qualifications. App. 62-68.[2]

On October 6, 2004, just two weeks after the District Court's entry of final judgment, Simmons' counsel informed one of Grand Victoria's attorneys of his intention to file a petition to intervene on behalf of certain putative class members to appeal the order decertifying the class. The following day, October 7, Simmons' counsel reiterated his intent to pursue intervention on the ground that he was certain

---

[2] In the first half of 2004, while Grand Victoria's summary judgment motion was pending, one of the former attorneys for the putative class, Mr. Flaxman, who is also the attorney for Petitioner Simmons herein, filed five individual lawsuits on behalf of 16 former putative class members. Simmons, however, never filed a charge of discrimination with the Equal Employment Opportunity Commission or otherwise pursued an individual claim after the decertification of the class.

that Ellis and English would not be pursuing an appeal. 7th Cir. Record, November 22, 2004, Defendants-Appellees' Reply in Support of Motion to Dismiss Appeal ("Reply Br."), Exh. A, Affidavit of Joel Rice. Simmons' counsel did not file his petition to intervene, however, until two weeks later on October 20, 2004. The petition itself acknowledged an awareness on the part of Simmons' counsel that Ellis and English "have shown little interest in prosecuting their individual claims and have no interest whatsoever in serving as the champion of the interests of the unnamed members of the putative class." R. 127, Pet. to Intervene, ¶ 3, p. 2. The petition was filed on behalf of 16 would-be intervenors, of whom all but Simmons were simultaneously pursuing individual actions. Even though the petition was filed 28 days after the entry of final judgment, no attempt was made to have it heard on an emergency basis. Rather, it was noticed up on the District Court's regular motion call for October 26 – four days after the period for appeal had run. R. 127.

At the October 26, 2004 hearing on the petition to intervene, Simmons' counsel conceded that he had not to date filed a notice of appeal. Although the District Court granted the petition to intervene, the Court stressed that it took "no position on whether the appeal is valid in view of the fact that no notice of appeal has been filed to date. That's up to the Seventh Circuit." 7th Cir. Record, November 4, 2004, Mot. To Dismiss Appeal as Untimely, Exh. A, Transcript of Proceedings, p. 11. Later that day, a notice of appeal was filed for the first time.

B. Proceedings Before The Court Of Appeals

Grand Victoria moved to dismiss the petitioning-intervenors' appeal on the ground that it was untimely filed. In the interim, the Seventh Circuit had issued an order on

November 1, 2004 pointing out that the notice of appeal was filed four days late. The Seventh Circuit further noted that "[t]he district court has not granted an extension of the appeal period, *see* Rule 4(a)(5), and this court is not empowered to do so, *see* Fed. R. App. P. 26(b)." 7th Cir. Record, Order, November 1, 2004. Therefore, the court of appeals ordered the appellants to file a memorandum of law stating why the appeal should not be dismissed for lack of jurisdiction. The Seventh Circuit went on to invite the appellants to file an appropriate motion for extension of time in which to file a notice of appeal in the District Court "as soon as possible." *Id.* The appellants filed a jurisdictional memorandum, to which Grand Victoria responded. At no point, however, did the appellants, including Simmons, file a motion with the District Court to extend the time for filing a notice of appeal.

On January 26, 2005, a Seventh Circuit panel consisting of Judges Easterbrook, Rovner, and Manion issued an unpublished order dismissing the appeal as untimely. App. 1-2. Contrary to Simmons' contention, the Seventh Circuit made no reference to its prior opinion in *Roe* v. *Town of Highland*, 909 F.2d 1097 (7th Cir. 1990). Rather, the dismissal rested upon the appellate court's application of Rule 4(a), Fed. R. App. P., which requires that a notice of appeal be filed within 30 days of the entry of final judgment. The Seventh Circuit pointedly added that the District Court had not granted an extension of the appeal period "for the simple reason that appellants never asked the district court to do so (although this court suggested this course of action in its November 1, 2004 order) . . .". App. 2.

REASONS FOR DENYING THE WRIT

Review by this Court of the decision dismissing the appeal below is neither necessary nor warranted. Contrary to Simmons' contention, the Seventh Circuit's determination that the appeal was untimely is not in conflict with this Court's decision in *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977). *McDonald* dealt with the issue of whether a putative class member's post-judgment request to intervene was timely under Rule 24(b), Fed. R. Civ. P. The Seventh Circuit's decision had nothing to do with the timeliness or propriety of intervention. Rather, the decision rested upon a straightforward interpretation of Rule 4 of the Federal Rules of Appellate Procedure, which requires that a notice of appeal be filed within 30 days of the entry of final judgment, unless an extension of time has been obtained. Furthermore, Simmons falsely raises the spectre of a conflict between *McDonald* and the Seventh Circuit's 15-year-old decision in *Roe* v. *Town of Highland*, 909 F.2d 1097 (7th Cir. 1990). Even if there were any conflict between the two decisions, which there is not, this case would not be an appropriate vehicle to address the issue because there is no indication that the Seventh Circuit relied upon *Roe* in issuing its order of dismissal, which cited solely to the applicable Federal Rules of Appellate Procedure. In any event, *Roe* involved a unique "procedural tangle" (909 F.2d at 1098) not present in *McDonald* and does not in any way conflict with, or impinge upon, this Court's ruling in *McDonald*.

Furthermore, Simmons' petition fails to raise any important question of federal law that requires addressing by this Court. The Seventh Circuit's decision below was contained in an unpublished order and, therefore, is of no precedential weight. Moreover, the decision below was in the context of a unique and involved procedural history unlikely

to recur in any other case. Put bluntly, Simmons' counsel's dilatory conduct and cavalier disregard for the Federal Rules of Appellate Procedure was what prompted the dismissal, rather than any interpretation of federal law by the Seventh Circuit requiring this Court's attention.

A. The Seventh Circuit's Dismissal Of The Appeal As Untimely Does Not Conflict With This Court's Decision In *United Airlines, Inc.* v. *McDonald.*

Simmons' contention that the routine dismissal of her appeal conflicts with this Court's decision in *McDonald* rests on a misreading of both *McDonald* as well as the rationale for the Seventh Circuit's decision. Contrary to Simmons' assertion, *McDonald* did not announce a "bright line rule" that so long as a putative class member's petition to intervene is filed within the 30-day period for taking an appeal, the notice of appeal will be deemed to have been timely filed on the date the petition was filed. Pet. 6. Rather, *McDonald* dealt with a different issue entirely – namely, whether a putative class member was required to intervene within the limitations period for bringing an individual suit established by this Court in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974). The Court in *McDonald* concluded that the putative class member's post-judgment intervention was timely based upon the "critical fact . . . that once the entry of final judgment made the adverse class determination appealable, the respondent quickly sought to enter the

litigation." *McDonald*, 432 U.S. at 394.[3] Although the Court in *McDonald* noted that the putative class member had filed her motion to intervene within the time period for taking an appeal, that observation was made in the context of assessing whether the intervenor had acted promptly enough for purposes of Rule 24(b), Fed. R. Civ. P., which governs intervention, not the time period for pursuing an appeal. Nowhere in *McDonald* is there any suggestion, express or implied, that the requirements of Rule 4(a) of the Federal Rules of Appellate Procedure are suspended for putative class members who seek to pursue an appeal.

In dismissing Simmons' and the other intervenors' appeal, the Seventh Circuit did not "refuse[] to follow" *McDonald*, contrary to Simmons' assertion. Pet. 5. As shown above, *McDonald* dealt with the narrow issue of whether intervention was timely sought. Here, the District Court granted the putative class members' request to intervene and the Seventh Circuit's dismissal had nothing to do with the propriety of that determination. Rather, the Seventh Circuit's ruling rested on a straightforward interpretation of Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure, which requires that a notice of appeal be filed within 30 days of entry of final judgment. The 30-day time period for appeal is, as this Court has stated, "mandatory and jurisdictional." *Browder* v. *Director, Department of Corrections of Illinois*, 434 U.S.

---

[3] Unlike the intervenors in this case, the petitioning class member in *McDonald* acted with alacrity, filing her motion 18 days after the entry of final judgment, "well within the 30-day period for an appeal to be taken." 432 U.S. at 390. Here, by contrast, Simmons and the other intervenors waited until 28 days after entry of final judgment to file their petition, even though their counsel had expressed his clear intention to take such action two weeks earlier. 7th Cir. Record, November 22, 2004, Reply Br., Exh. A, Rice Aff.

257, 264 (1978)(internal citations omitted). Simmons and the other putative class members did not file their notice of appeal until four days after the appeal period had run, thus depriving the appellate court of jurisdiction. As the Seventh Circuit further noted – based upon a plain reading of the applicable rules – the intervenors never requested that the District Court grant an extension of the time to appeal, and the Court of Appeals lacks the power to grant such an extension. *See* Rule 4(a)(5) and Rule 26(b), Fed. R. App. P.[4] The Seventh Circuit's ruling presents no conflict with *McDonald*.

Simmons further contends that, in dismissing her appeal, the Seventh Circuit was following its earlier decision in *Roe* v. *Town of Highland*, 909 F.2d 1097 (7th Cir. 1990) – a decision that Simmons claims has "limited this Court's bright line rule" in *McDonald*. Pet. 5. Contrary to Simmons' contention, the Seventh Circuit's unpublished dismissal order makes no mention of *Roe*, but rather relies exclusively upon a plain reading of Rules 4 and 26 of the Federal Rules of Appellate Procedure. Hence, it is unnecessary to address the Seventh Circuit's 15-year old decision in *Roe*. Even if the order of dismissal here was influenced by *Roe*, that earlier Seventh Circuit decision does not conflict with *McDonald*. Rather, the decision in *Roe* was the product of a unique "procedural morass" (909 F.2d at 1100) not present in

---

[4] Simmons' reference to *United States for Use and Benefit of Canion* v. *Randall & Blake*, 817 F.2d 1188, 1192 (5th Cir. 1987), is misplaced. Pet. 6. As Simmons acknowledges, *Randall & Blake* involved a motion to intervene for purposes of filing a complaint, not, as in *McDonald*, for the purpose of pursuing an appeal. In the quite different context presented by *Randall & Blake*, there was a statute of limitations that could not be extended. Here, by contrast, Rule 4(a)(5), Fed. R. App. P., expressly allows for an extension of the appeal period.

McDonald. The proposed intervenor in *Roe*, Ms. Morgan, filed her motion to intervene 29 days after entry of final judgment. *Id*. at 1098. The district court did not rule on Morgan's motion to intervene. In the meantime, Morgan's attorney simultaneously pursued a timely appeal on behalf of the putative class representative. The class appeal was ultimately dismissed with prejudice for lack of prosecution. *Id*. Morgan did not request a ruling from the district court on her pending motion to intervene until one day before the class appeal was dismissed with prejudice. By the time the district court took up Morgan's motion, the appeal had been dismissed. Accordingly, the district court denied Morgan's motion on the ground that there was no action pending for Morgan to join. Morgan appealed from that determination. *Id*.

The Seventh Circuit in *Roe* held that, given the unique procedural tangle presented by that case, the district court did not abuse its discretion by denying Morgan's motion to intervene. 909 F.2d at 1100. In its affirming opinion, the Seventh Circuit cited *McDonald* as illustrating the correct procedure to be followed in these cases. The court noted that in *McDonald* the intervenor had filed her motion 18 days after entry of final judgment, and that the better course of action is for the moving party to "allow the district court sufficient time to rule on the motion." *Roe*, 909 F.2d at 1099. The Seventh Circuit further observed, however, that a potential intervenor has several avenues available for assuring that a timely appeal is taken, even if, unlike in *McDonald*, the matter is not likely to be ruled upon within the originally allotted 30-day time period. Those avenues include (a) filing the petition to intervene as an emergency motion so the matter can be ruled upon within the 30-day period for an appeal; (b) requesting an extension of time to file the appeal, as permitted by Fed. R. App. P. 4(a)5); or (c) filing a timely

notice of appeal followed by a request for remand to the district court to resolve the issue of intervention. *Id.* at 1099-1100. While the Seventh Circuit's dicta in *Roe* is instructive with respect to the situation faced by Simmons and the other intervenors here, nothing in that decision is inconsistent with this Court's holding in *McDonald*.

B. The Dismissal Of Simmons' Appeal As Untimely Does Not Raise Any Important Federal Question Requiring Resolution By This Court.

The Seventh Circuit's dismissal of Simmons' appeal as untimely in no way conflicts with or impinges upon this Court's decision in *McDonald*. Nor does Simmons' petition raise any important question of federal law that requires addressing by this Court. *First*, the Seventh Circuit order that is the subject of this petition is unpublished and therefore of no precedential weight or import. *See* 7th Cir. Rule 53(b)(2)(iv) ("[e]xcept to support a claim of res judicata, collateral estoppel or law of the case," unpublished orders "shall not be cited or used as precedent"). *Second*, as Grand Victoria's statement of the case shows in greater detail, this matter involves a highly unusual and involved procedural background that is unlikely to recur in any other case. Moreover, there will be few, if any, instances where a former class counsel, knowing that his former clients, the putative class representatives, will not be pursuing an appeal, nevertheless waits until the eleventh hour to file a petition to intervene on behalf of other putative class members, and takes no steps to preserve a right of appeal, including filing a motion to extend time under Rule 4(a)(5), Fed. R. App. P., despite an express invitation from the court of appeals that such a course of action be taken. In sum, no larger federal issue is raised by this case. Rather, the Seventh Circuit's dismissal of the appeal was the inevitable consequence of the

dilatory conduct of Simmons' counsel, who cavalierly disregarded the plainly applicable Federal Rules of Appellate Procedure.

CONCLUSION

For all of the foregoing reasons, Grand Victoria respectfully requests that this Court deny Simmons' Petition for a Writ of Certiorari to the Seventh Circuit Court of Appeals.

Respectfully submitted,

Jane M. McFetridge
Counsel of Record
Joel W. Rice
FISHER & PHILLIPS LLP
1000 Marquette Building
140 South Dearborn Street
Chicago, Illinois 60603
Telephone: (312) 346-8061

Counsel for Respondents